IN THE HIGH COURT OF THANZANIA

(LABOUR COURT DIVISION)

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LABOUR REVISION NO.52 OF 2020

COLMAN JEROMIN MWACHA.....APPLICANT

VERSUS

BULYANHULU GOLD MINE LIMITED.....RESPOMDENT

(revision from the award of the Commission for mediation and Arbitration-Shinyanga)

Lucia Chrisantus-Arbitrator

In

CMA/SHY/KHM/83/2019

.....

RULING

3rdJuly&6thAugust,2021

MDEMU, J.:

By way of chamber summons and notice of application under the provisions of sections 91 and 94 of the Employment and Labour Relations Act, Cap.366 (the ELRA) and Rules 24 and 28 of the Labour Court Rules, GN No.106 of 2007, supported by an affidavit, the Applicant moved this court on the following orders:

1. That, the honourable court may be pleased to call and revise arbitration proceedings in respect of the labour dispute No.

CMA/SHY/KHM/83/2019 by the Commission for mediation and Arbitration at Shinyanga.

2. *That, the honourable court may be pleased to call and revise the award issued under that arbitration due to irregularities and order reinstatement of my employment and payment of all remunerations and other entitlements from termination date. If fail to reinstate, he must effect payment of 36 months remunerations being compensation for unfair termination of my employment, payment of all remunerations from a date of termination until a date of final payments, payment of 36 months' salary being life insurance compensation not paid during termination of employment, payment of any other benefits, entitlements and dues not paid during termination of employment.*
3. *That, the honourable court may be pleased to grant any order that it consider just and convenient to grant.*
4. *Costs be borne by the Respondent.*

Briefly, the Applicant was employed by the Respondent on 11th of April 2012 in the position of driver and later shifted to security department.

Sometimes in 2014, he contracted mechanical low back pain. He was terminated on 30th of September, 2018. He appealed to CMA which awarded him a compensation of six months' salaries amounting to tshs. 10,833,510/=. This was on 2nd of July, 2020. He was not happy with the award hence the instant application for revision on the orders stated above.

On 3rd of June, 2021, parties agreed that hearing of the application be by way of written submissions. Complying with the court's order, Benjamin Daudi Dotto, personal representative of the Applicant filed his written submissions on 17th of June, 2021. He submitted in three grounds as raised in paragraph C of the affidavit.

In the ground that the Respondent had no fair reasons to terminate the Applicant, it was his submissions that, in terms of the provisions of section 38(1) (c)(i) of the ELRA, the burden of proof that termination on operation requirements (retrenchment) followed procedure lies to the employer.

In this, he observed that, the Respondent did not prove that the Applicant was consulted on reasons towards redundancy. He faulted the letter dated 23rd of May, 2017 on consultation meeting because according to

the minutes, retrenchment exercise was to be effected from 15th May to 30th June, 2017 but his retrenchment was on 30th of September, 2018. His view was therefore that, his redundancy got cancelled and he resumed for work and got paid salary as per the salary slips dated 20th January, 2018(P5). It was therefore wrong for the Arbitrator to hold that, the Applicant did not work for a period of 8 years while the Applicant was with the industrial relation department and that, the security department at his retrenchment never existed.

He added that, as the redeployment meeting dated 28th of September, 2018 sought to have no alternative job to the Applicant, then the Respondent was to terminated the Applicant on incapacity grounds and not retrenchment. He thus concluded that, there were no fair reasons to terminate the Applicant.

On the ground that the Respondent partly followed procedures, his view was that, as the Applicant was terminated on grounds of retrenchment and not ill health then the Respondent had to comply with the procedures stipulated in section 38 (1) (a-c) (i-v) and (d)(i-iii) of the ELRA. The Applicant was not given notice of retrenchment, relevant information not disclosed and that he was not consulted as required by the law. The only measure taken

by the Respondent according to Mr. Dotto was to convene a redeployment committee meeting on 28th of July, 2018 to accommodate the Applicant's incapacity. He added that, it was wrong for the Arbitrator to consider the retrenchment process conducted in May 2017 because that was sealed in 30th June, 2017 as per the award dated 24th July, 2012 in labour dispute No. CMA/SHY/116/2017 between NUMET(the Consulting Party) and BGML(the Employer). He stated further that, the Applicant was not included because his redundancy letter got cancelled. He thus concluded that, in case the Respondent wanted to retrench the Applicant then had to comply with section 38 of the ELRA.

As to the third ground that the Arbitrator did not determine life insurance compensation, his view was that, as Rule 8(1)(a) of the Employment and Labour Relations (Code of Good Practice) GN No.42 of 2007 require termination to be in accordance with the employment contract, then as per the section 5 of the contract(P1), the Applicant was entitled to medical benefits of Group Life Insurance Policy (P8). He submitted so because of the Applicant's permanent incapacitation and that, the insurance policy provides for three years' basic salary as compensation. He also cited the provisions of

section 40(2) of the ELRA insisting that, the said compensation was to be awarded in addition to other compensations the Applicant was entitled to.

In the fourth ground, he thought the six months' salary compensation violated the provisions of section 40(1)(a)(b) (c) of the ELRA which require compensation of not less than twelve (12) months where there is no reinstatement or reengagement of the employee for unfair termination. In his view, as the Arbitrator found that the Respondent failed to prove properly grounds for termination on operation reasons, then he did not deserve the said award in terms of Rule 32(5) (a-c) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN No.67 of 2007 requiring appropriate compensation depending on circumstances of each case considering maximum compensation prescribed and the extent of unfairness of termination.

He thus concluded that, as the Arbitrator thought the remedy available was compensations, then the Applicant was entitled to a compensation of thirty-six (36) months and not the six (6) months awarded. He cited the case of **Isaac Sultan vs North Mara Gold Mine Limited, Consolidated Labour Revision No.16&17 of 2018**(unreported) to bolster his argument.

In reply, Mr. Joseph Nyerembe, learned Advocate for the Respondent Company filed his written submissions on 1st of July, 2021. Mr. Nyerembe prayed the notice of opposition and an affidavit in reply be adopted to form part of his submissions. He then drew the attention of this court that, the Applicant's personal representative did not submit on grounds as per the affidavit. On whether the Arbitrator partly had fair reasons to terminate the Applicant as per paragraph (c) (i) of the affidavit; it was their submissions that, the Applicant was retrenched and not terminated on medical grounds. In this he thought, as correctly observed by the personal representative, issues framed on retrenchment got not determined by the Arbitrator. Mr. Nyerembe thus asked this court in terms of the provisions of section 91(2) (c) of the ELRA to quash and set aside the decision and order the Arbitrator to compose a fresh award.

Alternatively, Mr. Nyerembe asked this court to hold that, termination on the ground of retrenchment was substantively and procedurally valid. The reason for retrenchment as per exhibit D1 was that, as the Respondent outsourced security services to G4 Security, then all employees in the security department have to be retrenched. He added that, DW1 was not cross examined on reasons for retrenchment by the Applicant at CMA and as

per **Sarkar on Evidence, 14th Edition, 1993 Vol.2** at page **2007,** the Applicant is taken to admit on reasons for termination on retrenchment.

He added that, in terms of section 37(2)(b) (c) of the ELRA and Rule, 9(4) (d) and 23(1) (2) (c) of GN No.42 of 2007 the Respondent was in the course of restructuring the company by outsourcing security services and concentrate on mining activities thus had fair and valid grounds for retrenching the Applicant. He stated also that, the Respondent followed procedures stipulated in section 38 of the ELRA because NUMET was consulted (exhibit D3). He further added that Employees were allowed to volunteer retrenchment (D4) however, the Applicant refused to complete termination processes (D3).

Importantly to Mr. Nyerembe was the decision of CMA in CMA/SHY/116/2016 blessing the Respondent retrenchment actions when NUMET challenged the said move to the CMA. In his view therefore, the Applicant was to challenge the CMA decisions on retrenchment, thus he is barred to find the same unfair. He thus summed up in this ground that, there were valid reasons to terminate the Applicant and that the procedure was also followed.

On the ground that the Arbitrator erred in not determining the question of life insurance compensation; his view was that, as the insurer is regulated by Tanzania Insurance Regulatory Authority(TIRA), in terms of Act No.10 of 2009, CMA has no jurisdiction to deal with insurance claims. Thus, he added, if the Applicant was not happy, under the provisions of section 124 of Act No.10 of 2009, would have referred his claims to relevant authority.

He thus concluded in this that, matters relating to Sanlam Life Assurance Tanzania Limited are not labour disputes related as per section 14 of the Labour Institutions Act, 2004 and that the said insurance company, even when allowed, was not a party to CMA proceedings. Alternatively, he added that, clause 5 of the employment contract provides for medical insurance and not life assurance as intimated by the Applicant.

As to six months' compensation, his view was that, the Applicant has abandoned matters on payment of compensations from the date of redundancy. He thus submitted that, the Arbitrator was justified to award compensation depending on the circumstances of the case. He cited the case of **Sodetra (SPRL) Ltd vs. Njellu Mezza & Another, Revision No.207 of 2008** (unreported) such that in exercise of his discretion, the Arbitrator is not mandated to order twelve (12) months' compensation under section

40(1)(c) of ELRA. He also cited the case of **Felician Rutwaza vs World Vision Tanzania , Civil Appeal No.213 of 2019**(unreported) that, where reasons for termination are valid and fair, then compensation can be even below of what is prescribed in the law. He thus distinguished the case of **Isaac Sultan**(supra) cited by the Applicant as the termination was both substantively and procedurally unfair which is not the case in the instant application. He thus thought the application has no merit and asked me to dismiss it.

In rejoinder, the Applicant's personal representative filed his rejoinder on 8th of July, 2021. He simply clarified few issues as he mostly reiterated his submissions in chief. On the prayer of the Respondent that this court should quash the award and order the CMA to compose a fresh one, his views was that, the Respondent did not indicate that in his notice of opposition and counter affidavit and that would have also filed a cross revision. He also rejoined that, participation of NUMET and outsourcing of security department services are not at issue but that, the Applicant's retrenchment was cancelled and was called back to work.

Having taken into account submissions of parties and the entire record, one question to ask is whether the Applicant's termination was on fair and

valid grounds. Coming to this end, it is not disputed that the Applicant was terminated from his employment and that, in the security department where he was deployed, services thereto were outsourced to G4 Security. It is equally on record that, the Applicant was a member of NUMET and that, in the exercise of retrenchment, NUMET attended consultation meeting. What parties differ is an answer to the question that; was the retrenchment processes included the retrenchment of the Applicant? The Applicant submitted to have been retained to work when other employees in the security department got retrenched. The Respondent insists that, he was included in the whole exercise.

In response to the first issue, the Applicant was terminated on operational requirement (redundancy) which, as per the provisions of section 37 of ELRA read together with Rule 9 and 23 of GN.42 of 2007, the Respondent outsourced security services to G4S and as the Applicant was an employee in that department, there was so far no service to render to the company hence retrenchment. Specific in section 37 (2) (a) (b)(ii) of ELRA it is provided that:

> *37.-(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.*

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

*(a) **that the reason for the termination is valid;***

*(b) **that the reason is a fair reason-***

(i) related to the employee's conduct, capacity or compatibility; or

*(ii) **based on the operational requirements of the employer,***

c) that the employment was terminated in accordance with a fair procedure. (emphasis mine)

The question of termination on operational requirement was restated in Rule 9(4) (d) of GN No.42 of 2007 in the following language:

9(4) Reasons which may justify termination by the employer are as follows-

a) Conduct;

b) Capacity;

c) Compatibility; or

d) Employers operational requirement. *(emphasis mine)*

As said earlier on, parties are not at variance that security department got outsourced and that, the Applicant was also in the security department. By the outsourcing, it means, the Respondent company was in the course of restructuring its operations. As per the laws just quoted above, the Respondent was justified to retrench the Applicant.

The next question is whether the Respondent followed the required procedures. The following provisions of section 38 of ELRA is relevant on this:

> *38.-(1) In any termination for operational 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 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) 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 trade union.

(2) Where in the consultations held in terms of sub-section(1) no agreement is reached between the parties, the matter shall be referred to mediation under Part VIII of this Act.

(3) Where, in any retrenchment, the reason for the termination is the refusal of an employee to accept new terms and conditions of employment, the employer shall satisfy the Labour Court that, the recourse to a lock out to effect the change to terms and conditions was not appropriate in the circumstances.

Did the Respondent follow these procedures? Both parties bank on the notice of retrenchment (D2) and the consultation meeting (D3). I went through the two exhibits, specific in D3 and could not see the name of the Applicant as among the employees engaged by the Respondent for retrenchment exercise.

I am aware that exhibit D2 (internal memo) was addressed to all employees but when it came to consultation meeting, the name of the Applicant was not included. This may raise different interpretations. One may construe tha, the Applicant was aware of the exercise. But now why his name is missing in the annexed names to exhibit D3? In this, the interpretation would be that of the Applicant that his retrenchment got cancelled. This fact has been conceded by the Respondent in his submissions that, the Applicant was not retrenched in the 1st move because he was sick.

The Applicant also confirms this fact in exhibit P3 that, he did not make the clearance due to the pains he contracted. In this therefore, the Respondent concedes that, the Applicant was not a party to processes in exhibits D3 and therefore the completion retrenchment exercise in D4 was not related to the retrenchment of the Applicant. In fact, looking at the salary slip (exhibit P5) to 20th of January, 2018, the Applicant was being paid salary, meaning that, he was still an employee of the Respondent. This is another evidence that retrenchment processes in exhibit D3 did not cover the Applicant. It may not therefore be misconceived that he was retrenched alone.

In essence, in this latter, the Arbitrator at page 19 through 20 observed, which I agree that, the Applicant was called to a consultation meeting and in fact, even in exhibit P3, he did not do the clearance because he was sick, meaning that he was aware. I think this is what prompted the Arbitrator to hold that, the employer partly followed the procedure. This being the case, I entirely agree with the arbitrator that, the Employer did not fully comply with the procedure on retrenchment.

On that stance, I will not determine termination on medical grounds as the Arbitrator took a route which the Employer did not deploy. In fact, the question on illness of the Applicant came into consideration when retrenchment process was hot. The Applicant was sick, the reason why in exhibit P3 could not make the clearance towards retrenchment.

Now to the compensation. In the award, the Arbitrator appeared to have mixed two issues. The question of termination on operation requirement and that of illness. As I stated above, in fact what prevented the Respondent to terminate the Applicant with others soon after outsourcing security services to G4S was that, the Applicant was sick and also as per exhibit P3, it is the illness that prevented the Applicant to make

clearance. At page 23 of the award, the Arbitrator observed the following regarding this:

> *Kuhusu mlalamikiwa kuhamisha kitengo alichokuwa anafanya kazi mlalamikaji kwenda G4S na hii kwa sababu nyingine ya mlalamikiwa kupunguza kazi mlalamikaji na mlalamikaji kuchelewa mwenyewe kwenda G4S, hii si sababu ya kutosha kwa kuwa mlalamikiwa kwa mujibu wa shauri hili, mlalamikiwa amekukuwa na mawasiliano ya maandishi mara zote na kama zoezi hili limefanyika na mlalamikiwa kuhamisha kitengo hicho, basi TUME ilitegemea kuona maandishi ya mlalamikiwa na G4S kukubaliana naye lakini hayapo ni maneno.*

This position, in my view, is evident that, the Respondent outsourced security services to G4S and that, the Applicant who was in that department have either to be relocated or retrenched. After having observed this, it was therefore irrational for the Arbitrator to invoke the provisions of Rule 21 of GN No.42 of 2007 to terminate the Applicant on health grounds.

Was a compensation of six months' salary adequate? The Applicant said it wasn't basing on the provisions of section 40(1) (c) of the ELRA that,

as the Respondent opted for compensation then it ought to be not less than twelve months (12) remunerations. The Respondent said it was justified and in fact it may be lesser than the six months' compensation.

In my considered view, what might have driven the Arbitrator to that conclusion is what he said that the Respondent partly complied with the procedure. At page 16 and 18 of the award, it is recorded that:

> ***S***: *Kama retrenchment iliisha tarehe 30/6/2017 ilikuwaje tena mkampunguza mlalamikaji?*
>
> ***J:*** *Retrenchment yake ilisitishwa kwa muda kutokana na kueleza anaumwa na yeye ndiyo aliandika katika kielelezo P3.*

At page 18....

> ***S:*** *Kwa nini hakuendelea kupunguzwa kazi?*
>
> ***J:*** *Alikuwa anaeleza anaumwa, asingepunguzwa kazi huku anaumwa.*

In this therefore, one may hold that, from the outset, the Respondent's intention to comply with procedures got halted partly by the Applicant's move to stop clearance as per exhibit P3. Later the Applicant was consulted. I am

aware that, the notice was not given after the first notice got frustrated by sickness of the Applicant. It in therefore, the Applicant was aware of the retrenchment and that, the Respondent was not the sole contributor to the frustrated retrenchment processes. In this, the arbitrator observed substantive fairness but procedural, partly unfair. Was the Arbitrator under the circumstances compelled to award six (6) months' remunerations. In the case of **Sodetra (SPRL) Ltd vs. Njellu Mezza & Another** (supra) it was stated that:

> *To be specific, ground 3 of the Applicant's affidavit responded in ground 3 of the Respondent's counter affidavit, raises the issue of substantive fairness, which as explained, was not in issue before the Arbitrator. It suffices to state now that the issue cannot be employer e.g. existence of efforts by the employer to facilitate finding of alternative employment in cases like the present where termination is for operational reasons; and such other relevant factors. This discretion however cannot be arbitrarily and is already guided by Guideline 32 (5) above.*

In light of the above reasons, it is my opinion that the arbitrator who has found unfair termination has discretion to award an appropriate amount of compensation found fair and just to both parties in the case and therefore section 40(1) (c) does not mandate the Arbitrator to order compensation of 12 months' pay I all cases of unfair termination.

In the case of **Felician Rutwaza vs World Vision Tanzania** (supra) the Court of Appeal blessed interpretation of section 40 (1) (c) of ELRA by quoting relevant part of the decision in **Sodetra (SPRL) Ltd vs. Njellu Mezza & Another** (supra) at page 15 to 16 of the judgment that:

*In **Sodetra (SPRL) Ltd vs. Njellu Mezza & Another** (supra) refered to by Mr. Mkumbukwa, the High Court (Rweyemamu J.) interpreted section 40 (1)(c) thus:*

...a reading of other sections of the Act gives distinct impression that the law abhors substantive unfairness more than procedural unfairness, the remedy for the former attracts a heavier penalty than the latter.....(at page 10)

In the instant application, there was valid and fair reasons to retrench the Applicant. Partial fulfillment of the procedural law, in my view, may not attract heavier penalty. I thus do not see **one**, if there is procedural irregularity committed by the Arbitrator as to require quashing of the award and order a composition of a fresh award. What he did was a mixed grill of determining the dispute by applying both principles of retrenchment and termination through incapacitation. This was a question of assessment of the evidence. **Two**, I have no reason to interfere with the award as the Arbitrator considered substantively(redundancy) was valid but procedurally not properly manned.

As to life insurance compensation, I think this should not detain me. As submitted by the Respondent, clause 5 of the employment contract is on medical insurance and not life insurance. The said clause is crafted in this way:

Medical benefts.

For the duration of your employment with the company you will be entitled to medical cover for yourself, one spouse and

four registered dependants. The company will select the most appropriate medical scheme which could change from time to time.

As it is, there is nothing like life assurance cover policy intimated in the said clause. This ground therefore has no merit and is accordingly dismissed. All said and done, I have not observed any valid grounds to faulty the arbitrator in his award. The application therefore fails. Each part to bear own costs. It is so ordered.

Gerson J. Mdemu
JUDGE
06/08/2021

DATED at **SHINYANGA** this 6th day of August, 2021.

Gerson J. Mdemu
JUDGE
06/08/2021