IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

[LABOUR DIVISION]

AT ARUSHA

REVISION APPLICATION NO. 92 OF 2018

(C/F Labour Dispute No. CMA/ARS/ARB/183/2017)

FREIGHT IN TIME (T) LIMITED ..... 1ST APPLICANT

SUNFRESH LIMITED ..... 2ND APPLICANT

Versus

RAHABU NJERI WANGAI ..... RESPONDENT

JUDGMENT

20th April & 25th May, 2021

Masara, J.

Rahabu Njeri Wangai, the Respondent, was employed by the Applicants as Customer Service Relationship Manager on 15/5/2014. Her employment was terminated on 4/3/2017 on the ground of retrenchment, due to financial downturn that the company was facing. She instituted her claims in the Commission for Mediation and Arbitration for Arusha (the CMA), vide labour dispute No. CMA/ARS/ARB/183/2017. She alleged unfair termination of her employment. Her claims were for a sum of TZS 36,736,780.90/= being one month's salary in lieu of notice, severance pay, salary for March 2017, 12 months' salary compensation and Certificate of service. The Applicant objected to the claims stating that the Respondent was not terminated but was retrenched after a series of consultations, whereby employees were informed of the economic status of the Company. The Applicants stated that it was not only the Respondent who was retrenched as there were also 9 other employees retrenched. Further, that the Applicants paid the Respondent all her entitlements which amounted to TZS 3,899,747.14/=.

After hearing, the CMA found that the Respondent's retrenchment was unprocedural and without valid reasons. The CMA arbitrator awarded the Respondent TZS 36,242,804/= being one month salary in lieu of notice, the March 2017 salary, severance pay (gratuity) and 12 months' salary compensation for unfair termination. The Applicants were not satisfied by the CMA award, they have approached this Court intending to challenge the CMA award. The Application is supported by an affidavit sworn by Mr. Emmanuel Shio, learned advocate. The affidavit contains the grounds for the Application. The Respondent contested the application in a counter affidavit attested by Herode Bilyamtwe, Personal Representative of the Respondent. The application was heard through filing of written submissions.

Mr. Elibariki Maeda, advocate for the Applicants, raised two issues in his submission. The first issue is whether the Applicant had valid reasons and applied fair procedure in terminating the Respondent's employment. Submitting on that issue, Mr. Maeda contended that the evidence adduced at the CMA proved that the Respondent's employment was terminated on economic downturn resulting into decrease in company income causing financial hardship, therefore retrenchment was not optional. He cited the case of ***NUTMET Vs. North Mara Gold Minde Ltd***, Labour Division DSM, Revision No. 6 of 2015. He maintained that the Applicants' witnesses who testified in the CMA narrated on how the consultations were made between the Applicants and the Employees. According to Mr. Maeda, information regarding the retrenchment was communicated to all employees, including the Respondent. Negotiation meetings were convened, including the meeting convened in November 2016, leading to

Notice to all the employees in December, 2016. The Respondent was terminated in March 2017. The learned advocate added that during cross examination the Respondent admitted that the employees were informed of the economic hardship and they were told to wait for the letters. He therefore concluded that Applicants had valid reason to terminate the Respondent and did so on fair procedure.

The second issue raised by Mr. Maeda was that the CMA erred in law and in fact for failure to take into account that the Respondent was paid all her retrenchment benefits. Submitting on this issue, Mr. Maeda insisted that it was not fair for the CMA to award the Respondent one month pay in lieu of notice because prior to retrenchment she was served with termination notice on 3/2/2017 (exhibit D2). Also, it was wrong for the CMA to award the Respondent the salary of March 2017 while the Respondent was terminated on 4/3/2017 as per exhibit D1. According to Mr. Maeda, the first four days worked were paid in the package paid to the Respondent by the Applicants. He fortified that severance pay paid to the Respondent was also covered in her final benefits, and the Respondent admitted in her testimony that she was paid her dues, albeit not in full. He insisted that the amount calculated by the CMA differed with the one paid by the Applicants only to the tune of TZS 41,753.65. The learned counsel urged the Court to pay that balance only. In totality, Mr. Maeda reiterated his prayers that the CMA award be quashed and set aside and the Application be allowed.

Contesting the application, Mr. Herode Bilyamtwe, Personal Representative for the Respondent submitted that the Applicants'

advocate misled himself on the gratuity issue as the CMA award does not state about payment of gratuity to the Respondent. He stated that the arbitrator was right to hold as he did since the Applicants' witnesses did not tender any documentary evidence to prove that the Company was not making profits and whether that financial position was communicated to the Respondent. He went further to say that the Applicants ought to have given evidence of the meetings by way of tendering minutes of the meetings, names of those who attended and the audited financial report showing the alleged loss. The learned counsel distinguished the ***NUTMET*** case cited by the counsel for the Applicants stating that in that case retrenchment was done before consensus was attained. Regarding the second issue, Mr. Bilyamtwe submitted that there was no documentary evidence to prove that the Respondent was paid terminal benefits. He prayed that the application be dismissed for lack of merits.

The scrutiny of the affidavits of the parties and the rival submissions of both parties give rise to two issues for determination; namely, whether the Respondent's termination of employment by the Applicants was substantively and procedurally fair and, if the first issue is answered in the affirmative, whether the reliefs awarded by the CMA were justified.

It was Mr. Maeda's contention that the Respondent's retrenchment was substantively fair because it was based on the operational requirements and the intended retrenchment was communicated to the employees in various meetings. It is the position of law that where an employer seeks to retrench an employee on operational requirements as in the present application, he has to conform to the procedure provided under section

38 of the Employment Act, Cap. 366 [R.E 2019] and Rules 23 and 24 of the Code of Good Practice, G.N No. 42 of 2007. Section 38 of the Act provides:

> *"38.- (1) In any termination for operational requirements (retrenchment), 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) 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 which members in the workplace not represented by a recognised trade union;*
> *(iii) any employees not represented by a recognized or registered trade union."*

Courts have time and again stated that in order for a retrenchment of an employee to be found substantially and procedurally fair basing on operational requirements, section 38 quoted above has to be complied with. This position can be found in the case of ***Bakari Athumani Mtandika Vs. Superdoll Trailer Ltd***, Labour Revision No. 171 of 2013 (unreported).

At the CMA, the two witnesses for the Applicants, DW1 and DW2, stated that they had consultations with the employees whereby they informed them of the intended retrenchment, reasons for the retrenchment and the

employees to be retrenched. Unfortunately, the record does not contain documentary evidence to support that the said consultations were conducted. Such information was crucial and needed to be supplied so as to justify the assertion that such consultations were made. That is a legal requirement and cannot be done away with. This position was reiterated in the case of ***Bernad Gindo and 27 Others Vs. TOL Gas Ltd***, Revision No. 18 of 2012. This is the decision relied by the Arbitrator.

Apart from consultations, the law requires the employer to disclose to employees reasons for the intended retrenchment prior to the retrenchment. In the instant application, the Applicants alleged that the retrenchment was due to economic difficulties facing the company, which lowered its income to the extent that they could not meet its operational costs. This information was not communicated to the employees. Evidence that the company was making loss was vital so as to justify retrenchment, otherwise the law bars retrenchment that aims at jeopardizing the employee's employment. This is what was decided in ***Moshi University College of Cooperative & Business Studies (MUCCOBS) Vs. Joseph Reuben Sizya,*** Revision No. 11 of 2012, Labour Div. DSM, where her Ladyship, Rweyemamu, J. held:

> *"Reasons for termination must be operational requirements. The first objective is to ensure that such terminations are substantively fair, meaning, operational grounds are not used as a smokescreen to mask termination based on prohibited grounds, otherwise unfair terminations. That is why to win in such a dispute the employer must establish that operational requirements were the real reason and not a pretext for terminating the involved employee."*

The procedures stipulated under section 38 of Cap. 366 are mandatory. They are requirements that must be adhered to by employers intending

to terminate employees on retrenchment basing on operational requirements. In ***KMM (2006) Entrepreneurs Ltd Vs. Emmanuel Kimetule,*** Labour Revision No. 19 of 2014, it was held:

> *"Since the applicant failed to prove that he made adequate consultation prior to retrenchment it is my view that the employer violated the provision of Section 38 of the Act, and Rule 23 and 24 of GN No. 42 of 2007 which provide the guidelines to ensure that employers take into consideration the welfare of their employees. The established principle in law is that for a termination on operation requirement (retrenchment) to be substantively fair the employer must adhere to Section 38 of the Act which is not the case in this application. The applicant violated Section 38 of the Act."*

The principles enunciated under section 38 of the Act are replicated by Rules 23 and 24 of the Rules. In the instant application, it is apparent that the Applicants did not adhere to the above procedures. There were no consultations prior the retrenchment and the reasons for the retrenchment remained in the breasts of the Applicant. The CMA's award cannot be faulted. The Arbitrator was right to hold that the Respondent's termination was both substantively and procedurally unfair. The first issue is, thus, resolved in favour of the Respondent.

The last issue faults the reliefs awarded to the Respondent. According to Mr. Maeda, the Respondent was paid her benefits prior to being retrenched. However, the record does not contain evidence proving that the Applicants paid the Respondent. In the CMA record, the Applicant stated that they paid the Respondent upon termination a one month' salary in lieu of notice and other outstanding payments and that the same were paid through a cheque. The Applicants, however, did not tender proof of those payments. The Respondent, on the other hand, seem to

have acquiesced to the fact that she received some payments, albeit not in full. Therefore, in terms of section 40, of Cap. 360, the reliefs paid to the Respondent by the CMA arbitrator were justified. However, the learned Arbitrator should not have paid what was already paid. The respondent admitted to have received some amounts during cross examination. In addition to that, the Applicants should also give the Respondent clean Certificate of Service. Since the Respondent's employment was unfairly terminated, she is entitled to the reliefs awarded by the CMA arbitrator, minus the amount paid to her, since the Respondent cannot be paid over and above what her entitlements in law are. The second issue is as well resolved in favour of the Respondent.

For the above reasons, the CMA's finding that the Respondent's termination was unfair is hereby confirmed. The Application is dismissed for want of merits. It only succeeds on the quantum to be paid to the Respondent. The Applicant to submit proof of payments made to the Respondent to the executing master for verification, failure of which the award to be paid in full. The Respondent be given a Certificate of Service.

Order accordingly.

THE HIGH COURT OF TANZANIA

Y. B. Masara,
JUDGE.
25th May, 2021.