THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

REVISION NO. 05 OF 2021

(Originating from the Complaint Ref. CMA/MBY/KYL/99/2018 of the Commission for Mediation and Arbitration for Mbeya at Mbeya)

BAYPORT FINANCIAL SERVICES (T) LTD.....APPLICANT

VERSUS

HERIETH NASHONI.....RESPONDENT

JUDGEMENT

Date of Hearing : 08/09/2021
Date of Judgment: 13/10/2021

MONGELLA, J.

This application is brought under section 91 (1) (a) & (b); 91 (2) (a) & (b) and 94 (1) (b) of the Employment and Labour Relations Act No. 6 of 2004; and Rule 21 (1), (2) (a) (b) (c) (d) (e) & (f), (3) (a) (b) (c) & (d); and Rule 28 (1) (a) (b) (c) (d) & (e) of the Labour Court Rules, G.N. No. 106 of 2007. It is supported by the affidavit of one Kassim Masimbo.

In the application the applicant prays for this court to revise, order and set aside the Arbitration Award issued by the Commission for Mediation and

Arbitration at Mbeya (CMA) rendered in Labour Dispute No. CMA/MBY/KYL/99/2018. The brief facts of the case are as follows:

The applicant, due to financial constraints, underwent a retrenchment in the beginning of the year 2017. The respondent was among the affected employees in the process. She filed a complaint in the CMA claiming unfair termination. The CMA ruled in favour of the respondent on ground of unfair procedure. Consequently, the applicant was compelled to pay her compensation for unfair termination of 24 months salaries, which in total amounted to T.shs. 17,150,640/-. Aggrieved by this decision the applicant filed the application at hand on the grounds that:

1. The arbitration Award issued by the CMA contains errors and material irregularities.

2. The applicant shall suffer injustice and unbearable financial loss if the respondent is allowed to execute the arbitration award.

The application was argued orally. The applicant was represented by Mr. Kassim Masimbo while the respondent was represented by Mr. Imani Mbwiga, both learned advocates. The applicant raised three issues for determination by this court, to wit:

1. *Whether the representation on retrenchment was lawful.*

2. *Whether the gap in postponing the date of negotiations was contrary to the law.*

3. *Whether the reliefs awarded of 24 months salaries was lawful.*

Addressing the first issue, Mr. Masimbo faulted the arbitrator's decision on the ground that he acted contrary to the law. He contended that the Hon. Arbitrator did not consider the law, arguments, and exhibits tendered before the CMA by the parties. Referring to page 7 of the award, he argued that the Hon. Arbitrator agreed that the applicant had cogent reasons for retrenchment, but only differed on whether the respondent was represented in the retrenchment process.

Mr. Masimbo contended that the foundation of the award of 24 months is based on the procedure whereby the respondent claimed not to have been involved in the negotiation process, on the ground that she did not appoint the representatives in the process. He added that it was agreed by the respondent and acknowledged by the CMA that the respondent received the notice and directions on how to appoint representatives. He referred to exhibits D1 and K1, being the notification letter and the email to all employees in the 9 zones, including the respondent. The notice and the email directed the employees to choose representatives to negotiate with the applicant on all the things listed in the notice. The employees were directed further that after choosing their representatives they were to send the names thereof to the Human Resource (HR) Office at 17hours. He said that the email was sent to all the branches countrywide, including the one in which the respondent was stationed.

Referring to the respondent's evidence in the CMA, Mr. Masimbo argued that the respondent tendered an exhibit showing that she received the

notice and understood it. He argued that the respondent decided to keep quiet while the rest of the workers participated in the process and sent names through the head of zones who copied the names to all the branches and the HR Office. He submitted further that from the respondent's branch two representatives were proposed being one Wilson Tanibali from Ileje branch and Eliezer Mbogo from Mpanda brach. The said names were communicated to all workers including the respondent. Mr. Masimbo contended that despite all the exhibits and information given, the Hon. Arbitrator never considered the truth that the applicant had no obligation to choose representatives, but the same were chosen by the workers themselves. He was of the view that it was only the respondent who decided not to participate in the process.

Mr. Masimbo faulted the finding by the Hon. Arbitrator to the effect that the respondent never participated in the negotiation process as the workers were scattered and the respondent might have opened the letter later. On this, he argued that the finding was the Arbitrator's own comment as it did not come from the respondent. Mr. Masimbo defended the modality invoked by the applicant, that is, "participation by representation" on the argument that the applicant's employees were not members in any trade union. He added that the said modality was proposed as there were workers throughout the country in 9 zones, thus it was imperative to negotiate on the retrenchment through representation.

Mr. Masimbo continued to argue that the issue thus to be considered is whether the modality of representation adopted by the applicant infringed any laws. Referring to section 38 (1) (d) of the Employment and

Labour Relations Act, Cap 366 R.E. 2019 (ELRA), he contended that the kind of people to be involved in retrenchment negotiations include trade union branches and or non-represented members. Considering that the applicant's members were not trade union members, he argued that the applicant in good faith directed for appointment of representatives. He was surprised that the Hon. Arbitrator ruled that the applicant was not part of the negotiations for reasons of not appointing a representative. He had a stance that the representation modality was fair as the respondent was notified and opted not to participate in choosing the representative.

The second issue concerns the date of notice. With regard to this issue, Mr. Masimbo challenged the decision of the Arbitrator in nullifying the whole process of retrenchment on the ground of discrepancy in dates. He contended that the date on the notice was 25th July 2018 and the date of negotiations was 27th July 2018 as evidenced in the minutes. Referring to the testimony of DW4, who was one of the representatives hailing from Mpanda branch, he said that the discrepancy on the dates was caused by logistical arrangements, particularly for people hailing from remote areas, including DW4. He added that DW4 testified he that arrived in Dar es Salaam on 26th July 2018 and participated in the meeting conducted on 27th July 2018. On these bases Mr. Masimbo faulted the findings of the Hon. Arbitrator who did not believe that the meeting was conducted, despite proof on exhibits, that is, the minutes and attendance register.

On the third issue, Mr. Masimbo challenged the award of 24 months' salaries awarded to the respondent. He had a stance that the award was unfair considering the grounds on which the Hon. Arbitrator reached his

decision and the fact that all workers were paid their retrenchment packages. He submitted that the Hon. Arbitrator unfairly considered two things in reaching the award issued. These are: One, that the respondent's salary of 800,000/- was small; and Two, that the applicant, as the employer, denied the respondent the opportunity to apply for branch owning.

Referring to exhibit D2, which provided the business trend, Mr. Masimbo argued that there were only 52 chances to own branches whereas there were 102 retrenched workers. In the circumstances, he was surprised at the Hon. Arbitrator's finding that the respondent was denied the opportunity to apply. He prayed for the court to be guided by the principles settled in the case of ***Felician Rutwaza v. World Vision Tanzania***, Civil Appeal No. 213 of 2019 in which it was held that procedural irregularities should not attract severe punishment.

Mr. Mbwiga argued generally in reply to Mr. Masimbo's arguments on all issues. He supported fully the CMA award. Referring to section 38 (1) of the ELRA, which provides for the procedure for retrenchment, he argued that the employer is obliged to issue notice of the intended retrenchment when the retrenchment is contemplated. In the matter at hand, he contended that the applicant testified that he started operating at loss from 2017, but issued the notice in 2018. In his view, the retrenchment, under the circumstances, was contemplated in 2017. Thus, issuing the notice in 2018 was late.

He challenged the argument by Mr. Masimbo that the Hon. Arbitrator never considered the exhibits tendered by the parties before the CMA. He contended that all the exhibits including exhibit B1 and the testimonies of witnesses of both sides were considered.

In reply to Mr. Masimbo's argument that the Hon. Arbitrator agreed that there was reasonable ground to retrench, he contended that the law does not only require for reasonable ground to retrench, but also for fair procedure. He added that the major issue considered by the Hon. Arbitrator was the process of involving the workers, particularly the respondent, on the retrenchment process. He argued that there was no evidence showing that the respondent was involved in the negotiation meeting, or that she was given feedback of the negotiation meeting.

He further challenged the argument that the respondent was involved through a representative. Referring to the testimony of DW4, he argued that when DW4 was cross examined as to who appointed him, he kept quiet. He could not state who appointed him.

Mr. Mbwiga further challenged the allegation that the respondent had information of the meeting saying that the allegation is false. He argued that even if she had the notice and assumed that she chose the representative, the notice of retrenchment showed that the meeting was to be conducted on 25th July 2018, but the minutes show that the meeting was held on 27th July 2018. He added that there was also no feedback showing that there was any agreement binding the workers. He was of the view that this casts doubts as to whether the meeting was really

conducted. He concluded that the said representatives were chosen by the applicant for reasons known to him.

With regard to the award of 24 months' salaries, Mr. Mbwiga supported the award on the ground that initially the respondent had prayed for 60 months' salaries as compensation however, instead, the CMA only awarded her 24 months' salaries. On those bases he was of the view that the relief awarded was fair in accordance with section 40 (1) of the ELRA. He prayed for the court to uphold the CMA award.

In rejoinder, Mr. Masimbo submitted that the process of retrenchment was ongoing and it was contemplated sometime in June 2018 when the mid-financial report was issued. He insisted that the Hon. Arbitrator refrained from considering some of the exhibits, particularly the minutes and the testimony of DW4 on attendance of the meeting on 26th. He disputed Mr. Mbwiga's contention that DW4 kept quiet when asked as to who appointed him to represent the workers. He said that DW4 explained as to who appointed him. He reiterated his argument that the respondent was notified through emails, which were also presented in evidence in the CMA. He had a firm argument that the case was decided on assumptions.

With regard to the relief awarded he insisted that compensation has to be awarded in accordance with the law and if it is awarded in excess then there has to be justification to that effect. He further insisted that the reasons advanced for awarding the reliefs to the respondent are unjustifiable. He prayed for the award to be quashed for lack of merit.

After considering the arguments by both counsels and the gone through the CMA record, I find that two main issues call for determination by this court. These are: One, whether the procedure to retrench the respondent was adhered in accordance with the law; and Two, whether the relief awarded of 24 months' salaries is justifiable.

Starting with the first issue, it is on record that the respondent was retrenched together with other employees of the applicant countrywide. As presented by Mr. Masimbo, the applicant underwent financial constraints and had to retrench. The reason for retrenchment as also found by the CMA is justifiable in accordance with the law. See: **Rule 9 (4) (d) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007**.

Section 38 (1) (a-c) of the ELRA provides for the procedure to be followed where an employer wishes to undergo retrenchment. The provision requires the employer to first issue notice of the intention to retrench as soon as it is contemplated; to disclose all relevant information on the intended retrenchment for the purpose of proper consultation; and to consult prior to retrenchment or redundancy on the reasons for the intended retrenchment, measures to avoid or minimize the intended retrenchment, method of selection of employees to be retrenched, the timing of the retrenchment, and severance pay.

Section 38 (1) (d) of the ELRA, provides for the groups of person(s) to whom the notice shall be given, the information shall be disclosed, and should be consulted in terms of section 38 (1) (a-c). These are: any trade

union recognised under section 67 of the ELRA, any registered trade union to which its members in the workforce are not represented by a recognised trade union; and like in the matter at hand, "***any employees not represented by a recognised or registered trade union***." The procedure is further explained in the "RETRENCHMENT PROCEDURE" provided under G.N. 42 of 2007.

The applicant, as argued by Mr. Masimbo, taking into consideration the fact that its employees did not belong to any trade union, opted to negotiate the retrenchment through representation. The law as it is, does not provide for negotiation through representation where employees do not belong to trade unions. It requires the affected employees to be notified and consulted in their own individual capacities.

Mr. Masimbo argued that the option to negotiate through representation was reached due to the applicant having branches throughout the country thus it was not easy to gather all the employees in the negotiations. As much as I agree that in certain circumstances, as the one faced the applicant, negotiations could be conducted through representation; I am of the considered view that the employee(s) ought to consent to be represented. **Rule 7 of G.N. No. 42 of 2007 "RETRENCHMENT PROCEDURE"** allows a minimum deviation from the procedures on appropriate circumstances, but the employer is required to act at all times in a fair manner taking into consideration the interests of the employees to be retrenched.

As argued by Mr. Masimbo and also evidenced in exhibit D1, which is the notice and the email to the employees, it is clear that the employees were given directives by their employer, the applicant, to choose representatives. The exhibits and the testimony of DW4 show that they were directed to choose two representatives being; the credit administration officer and the branch supervisor. This means that they had no choice than to choose a representative from the persons directed by the applicant.

In further scrutiny of the email sent by one named Eva through eva@bayport.co.tz I have noted that the email was sent on 23rd July 2018 at 3:21PM with title "NOTICE OF RETRENCHMENT" directing that the employees must have sent the names of the chosen representatives not later than 17hours. This proves that the employees were given less than two hours to make their choice of representatives. Considering the time in which the email was sent and the time the employees were to have sent the names of the representatives, I subscribe to the reasoning of the Hon. Arbitrator to the effect that it was difficult for the employees including the respondent to have acted on the directives of the said email and notice. Even if the respondent had seen the email, as she testified, she was justified not to act upon it given the time she was accorded to think and decide on the right person to pick as her representative.

Further, considering the fact that the communication from the employer, the applicant, had directed on who is to be appointed, that is, the credit administration officer and branch supervisor, I find the exercise of choosing representatives was not freely conducted. For being directed as

to who they should choose, I find the respondent's argument that she was not involved in the process holding water.

In the premises, in my considered view, those employees, including the respondent, who never opted to appoint any representative, ought to have been individually involved in the process for the procedure to be fair. To this point, the question of change of dates of the meeting becomes crucial. In my opinion, there is no offence in changing the dates of the meeting, however the same ought to have been communicated to all the employees to accommodate even those who would appear in person.

The procedure for consultation as provided under **G.N. No. 42 of 2007 "RETRENCHMENT PROCEDURE" under rule 2 (4)** obliges the management of the employer to accord the parties to be consulted an opportunity to prepare and to make representations on matters being consulted on. In the circumstances, it is my considered view that, even if the respondent had chosen a representative, the said representative ought to have presented in the negotiation meeting the proposals of the employees he is representing, including the respondent. Therefore, it was imperative for the applicant to ensure that the process of appointing a representative involved all the employees and that the said representatives held a meeting with the employees to collect their proposals on the matters to be consulted on, for them to be presented in the negotiation meeting.

As argued by Mr. Mbwiga and also observed by the Hon. Arbitrator, it is not clear as to whether the representatives were really chosen by the

employees. Though Mr. Masimbo disputed Mr. Mbwiga's contention that DW4, the supposedly representative of the respondent's branch, had no idea as to who appointed him, the record betrays Mr. Masimbo's stance. It is clear on page 11 of the CMA proceedings that when asked as to who appointed him, DW4 never provided any answer. It is also clear from his testimony that he never provided any feedback to the employees he purportedly represented as required under the law. This is because he testified as such saying that he only talked to those who called him.

To this juncture I am in tandem with the Hon. Arbitrator's findings that the procedure as enshrined under the labour laws was not adhered to, thus the respondent's termination was procedurally unfair.

Having observed as above, I now move to the issue on reliefs. The CMA awarded to the respondent compensation of 24 months' salaries. The Hon. Arbitrator reached the decision considering the fact that the respondent was not given chance to participate in the negotiation meetings, was not given the chance to have a representative, and was not given the opportunity to own a branch as an alternative way to curb the effects of the retrenchment.

Mr. Masimbo argued that the relief given was unfair, and the reasoning by the Hon. Arbitrator was incorrect, especially on the issue of being given an opportunity to own a branch. He argued so saying that there were more than 100 employees retrenched and the branches were only 24. With all due respect, I think he misconceived the reasoning by the Hon. Arbitrator which I find correct. What was at issue was not the question of the

respondent being a branch owner, but a question of her being informed of the opportunity and given a chance to apply for it regardless of whether she would be successful or not. This is an issue of fair treatment to the employees and nothing else.

However, on the other hand, I agree with the decision in ***Felician Rutwaza v. World Vision Tanzania*** (supra) that severe punishment should not be imposed on procedural irregularities. I thus find the compensation to the tune of 24 months' salaries being severe. I therefore reduce the amount awarded to the minimum compensation of 12 months' salaries in terms of **section 40(1) (c) of the Employment and Labour Relations Act**. The applicant should therefore pay the respondent T.shs. 8,575,320/- as compensation for unfair termination. The same should be effected within 60 days from the date of this judgment. The CMA award is therefore varied to the extent stated in this judgment.

Dated at Mbeya on this 13th day of October 2021.

L. M. MONGELLA

JUDGE

Court: Judgment delivered in Mbeya in Chambers on this 13th day of October 2021 in the presence of the respondent and his advocate Mr. Imani Mbwiga.

L. M. MONGELLA

JUDGE