IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION AT ARUSHA

LABOUR REVISION NO. 76 OF 2021

(Originating from Employment Dispute No. CMA/ ARS/ARS/119/20)

NELSON TITUS AND EIGHT OTHERS ..... APPLICANTS

Vs

SAINT GOBAIN LODHIA GYPSUM INDUSTRIES LTD ..... RESPONDENT

JUDGMENT

Date of last Order: 14-6-2022

Date of Judgment: 18-7-2022

B.K.PHILLIP ,J

Before me is an application for revision seeking to revise and set aside the award made by the Commission for Mediation and Arbitration ("CMA") at Arusha, delivered on 22nd day of July, 2021 in Employment Dispute No. CMA /ARS/ARS/119/2020. The application is made under the provisions of sections 91 (1) (a)(b), 2 (a) (c) and 94 (1) (b) (i) of the Employment and Labour Relations Act ("ELRA") read together with Rules 24(1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) and 28 (1) (a) (c) (d) and (e) of the Labour Court Rules, G.N. No. 106 of 2007. The application is supported by an affidavit sworn by Mr. Herode Bilyamtwe, the applicant's personal representative. The Respondent was represented by Mr. Kapimpiti Mgalula, learned advocate who swore a counter affidavit in opposition to the application. In this application the applicants pray for the following order;

i) That, this honourable Court be pleased to call for the records and proceedings, revise and set aside the Arbitrator's award delivered by Hon. Mouris Egbert Sekabila in order for this Court

to satisfy itself as to the correctness, legality and the orders contained in dispute No. CMA/ARS/ARS/119/20 delivered on 22nd day of July 2021.

ii) Any other relief this Court is pleased to make and any other order that this Court deems necessary in the interest of justice.

I ordered the application to be disposed of by way of written submissions. Before delving into the merits of this application, let me give a background to this matter, albeit briefly.

The applicants were employed by respondent between 2014 and 2016 in different positions. On the 19th day of March 2019 they were terminated from employment following the retrenchment of employees due to what was described by respondent as inability to meet the company's operational costs due to dwindling of its business which led to remarkable decrease of its income . Aggrieved by the termination of their employment, the applicants lodged complaints for unfair termination at the CMA. The issues framed for determination at the CMA were; one, whether the applicants were fairly retrenched. Two, what reliefs parties were entitled to. The applicants' complaints were heard on merit and upon receiving evidence from both sides the Arbitrator held that the applicants' retrenchment was fair. Thus, he dismissed the applicants' complaints for want of merit.

Aggrieved by the Arbitrator's decision , the applicant lodged the instant application on the following grounds:

i) That, the presiding Arbitrator erred in law and in fact to hold that their termination was fair while there was no documentary evidence adduced by the respondent to show how the

applicants were notified to attend the consultative meeting with the trade union ("TUICO").

ii) That, the presiding Arbitrator erred in law and in fact to hold that the applicants were consulted through TUICO, while the evidence adduced by applicants clearly shows that the applicants were not consulted.

iii) That, Arbitrator erred to hold that the respondent established the existence of financial constraints while there was no documentary evidence adduced by respondent to justify the financial constraints.

iv) That, the presiding Arbitrator erred in law and fact to hold that the signing agreement meant the employer and employees were in consensus for retrenchment's reason while the respondent failed to adduce the evidence to show how the consensus between the employees and employer has been conducted.

v) That, the presiding Arbitrator erred in law and fact to hold that the dispute for unfair termination lacks merits, while there was no dispute for unfair termination filed before it rather than unfair retrenchment.

Submitting for the application , the applicants' personal representative, adopted the contents of the affidavit in support of the application and went on submitting that the Arbitrator misdirected himself for holding that applicants' termination was fair while the issue in dispute was whether the applicants were retrenched fairly. He contended that unfair termination is governed by section 37 of the Employment and Labour Relations Act (" ELRA") and Employment and Labour Relations

(Code of Good Practise) Rules G.N.No.42 of 2007 (" G.N. No. 42 of 2007").

Furthermore, he submitted that no financial statement was tendered to prove financial constraints alleged by respondent to justify the retrenchment on the basis of financial hardships. The procedure provided under Rule 23 (4) of G.N. No. 42 of 2007 for fair termination based on operational reason was not followed. He contended that there was no fairness of reason or procedure in the whole process of retrenchment. He also contended that Exhibit P6 (Minutes of the meeting between TUICO and Respondent's management) is irrelevant as it was not lodged to the Labour Commissioner as required by Rule 23 (8) of G.N. No. 42 of 2007 and Section 71 of the ELRA.

Moreover, the applicants' personal representative argued that the Arbitrator did not consider the issue on reliefs the parties were entitled to.Thus, contravened the provisions of section 40 (1) (a) (c) and (3) of the ELRA .

At this juncture, let me point out that submissions made by parties have to be based on what is pleaded in the application. That is why the law requires the applicant to state clearly in the affidavit in support of the application the issues which the Court is called upon to determine (see Rule 24 (3)(b)(c)(d) of the Labour Court Rules G.N No. 106 of 2007). In this application the applicant's representative submitted on issues not pleaded in this application. The same have not been considered in this Judgment for the reason I have elaborated herein above.

In rebuttal, counsel for the respondent submitted that Arbitrator elaborated the reasons for his decision. He referred this Court to pages 4 to 6 of the Award. He further contended that the mandatory requirements under Rule 23 (4) and (6) of G.N. No. 42 of 2007 were fully complied with. The respondent issued a written notice of intention to retrench its employees (Exhibit P2), consultation prior to retrenchment was done (Exhibit P3), financial report was tendered (ID-1), meeting to discuss selection of employees to be retrenched was conducted (Exhibit P4), criteria for retrenchment were followed (Exhibit D5), applicants were fully involved in the process of retrenchment (Exhibit P10), trade union and respondent executed a retrenchment agreement (Exhibit P7) and retrenchment timing was made (Exhibit 7 clause 5.0 and P8 collectively). He further contended that applicants were fully paid their final benefits (Exhibit P9).

With regard to Exhibit P6,the counsel for the respondent submitted that the same was filed in the list of additional documents and when was tendered applicants did not object.

In rejoinder, the applicants' personal representative reiterated his submission in chief. He added that Exhibit P2 is not a notice of intention to retrench but a notice for consultation meeting. The method used by respondent for retrenchment, FIFO, that is, First In, First Out is not method used as criteria for selecting the employees to be retrenched. That the proper method is LIFO, that is, Last In, First Out. He maintained that using FIFO criteria instead of LIFO is material irregularity. He insisted that Exhibit P7 is not a retrenchment agreement as contended by counsel for the respondent.

From the submissions made by the applicant's personal representative and the learned Advocate, I am of a view that the issue for determination in this application is whether or not the applicants' retrenchment was done in accordance with the Law.

Upon perusing the Court's records , I am of a settled view that the contention made by the applicants' Personal representative that the Arbitrator misdirected himself for holding that termination was fair while the issue before him was whether the applicants were retrenched fairly is misconceived. It is in record that the issue that was framed for determination by the Arbitrator was whether the applicants were fairly retrenched. The Arbitrator made a thorough analysis of the documentary evidence tendered before him (Exhibits P1-P10 inclusive) on how the retrenchment exercise was conducted and reached to a conclusion that the applicants were retrenched on fair reasons and the legal procedures for retrenchment were adhered to.

Turning to the allegation that there was no financial statement tendered to justify financial constraints alleged by the respondent, it is on record that the PW3, the respondent's accountant testified before the CMA that the respondent was operating under loss and was facing serious financial constraints. His testimony was not challenged by the applicants in any way and I do not see any plausible reasons to doubt the same. In my opinion the standard of prove on the existence of financial constraints demanded by the applicant's personal representative is no envisaged in the labour laws.

With regard to the procedure used in retrenchment, the CMA records reveal that all required procedures were followed as per the Exhibits (Exhibits P2, P3, P4,P5, P7, and P10) tendered at the CMA by

respondent. TUICO leaders were fully involved in the whole process of retrenchment and applicants attended the consultative meeting prior to their retrenchment. The evidence adduced also reveals that there was a valid reason for the applicants' retrenchment, that is, financial constraints as alluded earlier in this judgment.

In addition to the above Rule 24 of G.N. No. 42 of 2007 provides that method of retrenchment should be agreed by both sides and should not be based on discriminatory grounds. Upon perusing CMA records and the exhibits tendered by the respondent (Exhibits P6 and P7), I noted that TUICO and the respondent agreed on the criteria and method which were used for retrenchment of the applicants. The Court's records also show that TUICO was acting on behalf of the employees. No evidence was adduced to prove otherwise. Thus , there is no any basis to fault the criteria used in retrenchment of the applicants. Moreover, exhibit P9 collectively proves that all applicants were paid their dues.

In the upshot, this application is dismissed in its entirety. This being a labour matter, I give no order as to costs.

Dated this 18th day of July 2022

B.K.PHILLIP

JUDGE