IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION NO. 42 OF 2021

BETWEEN

JOHHNSON NYABANGE WALUSE ..... APPLICANT

AND

EPSOM LIMITED ..... RESPONDENT

JUDGMENT

Date of last order: 13/07/2022
Date of Judgement: 26/07/2022

M. MNYUKWA, J.

The applicant filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (CMA) which was delivered on 07/10/2021 in Labour dispute No. CMA/GTA/67/2020. The application is made under the enabling provisions of the Employment and Labour Relations Act [Cap 366 RE 2019] (herein to be referred as the Act) and the Labour Court Rules, GN No.106 of 2007 (herein to be referred as the GN No 106 of 2007). The application is supported by the affidavit sworn in by his advocate. The respondent

challenged the application through the counter affidavit of Ronald Okari, the Principal Officer of Epsom Limited.

When eventually, the Revision was placed for hearing, the applicant was represented by the learned counsel, Alhaji A Majogoro whereas Mr. Laurent Bugoti, learned counsel represented the respondent.

In order to appreciate the context in which the labour dispute arose and later this Revision, I find it apposite to briefly explain the material facts of the matter as gleaned from the available court record. It goes thus: on 20th August 2019 the applicant was employed under a one-year contract by the respondent as auto electrician and the contract was ending on 20th August 2020 and the renewal of the new contract was supposed to take effect from 21st August 2020. That without further renewal in writing, the applicant continued to work with the respondent until on 27th October 2020 when his employment contract was terminated for the reason of operational requirements. It was alleged that, on the 20th of October 2020, the respondent issued a notice to all employees including the applicant about the presence of the retrenchment exercise on the alleged reason that their client has closed Nyankanga pitch.

Aggrieved by the respondent's termination notice and believing that there was no valid reason for his termination of employment contract and the procedures for termination were not followed, the applicant on 25th November 2020 lodged a labour dispute against the respondent in the Commission for Mediation and Arbitration (CMA) challenging the substantively and procedurally termination of his employment contract.

After hearing the parties, the CMA determined the matter in favour of the respondent as there was valid reason for termination and the procedures were properly followed.

Aggrieved by the CMA decision, the applicant on 5th November 2021 filed the present Revision seeking to challenge the decision delivered by the CMA. The applicant's statement of legal issues that arose from the material facts are as hereunder:

1. *Whether it was proper for the arbitrator to rule that the procedure for retrenchment were followed*
2. *Whether it was proper for the arbitrator to rule that the reason for retrenchment was valid in absence of the consultation meeting*
3. *Whether it was proper for the arbitrator to shift the burden of proof to the applicant instead of the respondent*

4. *Whether the arbitrator properly evaluated the evidence before her.*

The applicant prays this court to quash and set aside the award delivered by the arbitrator and award 10 months' salaries to the tune of Tsh 13,200,000 as compensation for unfair breach of contract and payment of subsistence allowance as prayed in the CMA Form No 1.

In arguing for the first legal issue, the counsel for the applicant submitted that the procedures for retrenchment were not followed as per the requirements of the law. He refers to section 38(1)(a)(b)(c) and (d) of the Act and Rule 23(3) and (4) of the Government Notice No 42 of 2007 which emphasizes on the following of procedure on retrenchment exercise.

He went on to attack that one of the important procedures is consultation since it is through consultation when the reason(s) for retrenchment are discussed between the applicant and the respondent and the chances to eliminate retrenchment if any are well discussed. He remarked that, in our case at hand consultation was not done as it is reflected in the CMA's proceedings. He added that, consultation can be either done at the individual level or through a recognized trade union in the workplace. As there was no any document tendered to show that consultation was conducted, it is clear that the same was not done.

To support his argument, he referred to the case of **Boni Mabusi vs The General Manager (T) Cigarettes Co. Ltd,** Consolidated Revision No 418 and 619 of 2019, HCT Labour Division at Dar es Salaam. He also referred to the case of **Security Group (T) Ltd V Samson Yakobo and 10 others,** Civil Appeal No 76 of 2016, CAT at Dar es Salaam, in which the court emphasized on the importance of the employee to be involved on every stage of retrenchment and that it is the duty of the employer to prove the same.

He retires and prays this ground to be allowed since the evidence on record does not show that the employees were consulted.

On the second legal issue, the counsel for the applicant challenged the reason for retrenchment by referring to section 38(1)(c)(i) of the Act as the reasons for retrenchment are discussed in the consultation meeting and that was not done of which to his view is a serious anomaly. He went on by referring to the Arbitral Award in which the Arbitrator validates the reason for retrenchment by using Exhibit D3. He complained that it was unfair for the arbitrator to use Exhibit D3 as the same was not properly admitted in court. He remarked that if Exhibit D3 will be expunged from the record as it was wrongly admitted, there will

be no any proof of the reason for retrenchment. He, therefore, prays this ground to be allowed too.

On the third ground, the applicant's counsel submitted that, the arbitrator shifts the burden of proof to the applicant which is contrary to section 37(2) of the Act which requires the employer to prove the fairness of termination. He bolsters his argument by referring to page 16 of the CMA proceedings which shows that the applicant was required to prove the fairness of termination. He, therefore, prays this ground to be allowed.

The counsel for the applicant abandoned the fourth legal issue as the same was captured on the foregoing issues. He concludes his submission in chief by prays the relief sought in the application to be granted.

In rebuttal, the counsel for the respondent jointly submitted on the first and second legal issues as presented by the applicant. He submitted that, in retrenchment exercise, it is not mandatory for all procedures to be followed by way of checklist. What is important is for the exercise to be done justly and fairly. He refers to Exhibit D3 to show that, the whole process of retrenchment between the employer and employee. He refers to the decision of this court in the case of **Bernard**

Gindo & 27 others v TOL Gas Limited, Labour Division DSM, Revision No 18 of 2012, Court Case Digest of 2013 as the court stated that section 38 of the Act reads together with Rules 23 and 24 of GN No 42 of 2007, that the said Rules are not necessary to be followed in checklist fashion. He added that, what is important is to give the directives that the consultation was fair and adequate. For that reason, it is not necessary for consultation to be in writing as it is only enough to state that the consultation was conducted and that no need of documentary proof.

He went on that the reason for retrenchment was provided for in Exhibit D3 though the advocate of the applicant challenged the manner it was admitted. He submitted that, DW1 was recalled under section 147 of the Tanzania Evidence Act, Cap 6 R.E 2019 and it was during that time when Exhibit D3 was tendered and admitted, and the opponent party was given the opportunity to cross-examine it.

On the third legal issue, the counsel for the respondent stated that the records show that the duty to prove fairness of termination remained to the employer and after the tribunal analyzed the evidence of both parties dismissed the application.

He thus retired his submission by praying the Revision to be dismissed since it lacks merit and the decision of the CMA to remain intact.

In rejoinder, the counsel of the applicant mainly reiterates what he had submitted in chief. He emphasized that as the respondent admitted that consultation is not necessary to be done, and if the court rules so, it will open the pandora box as the employer will retrench without consultation. Insistingly, he stated that, there should be a documentary proof to show that consultation was done. He retires by inviting the court to look at the way exhibit D3 was admitted which destroys the meaning and purpose of cross-examination. He concluded by praying the Revision to be allowed.

After considering the rival submissions from both counsels, I find what is disputed are the reasons and the procedure for retrenchment. Being that is the case, this Court is called upon to determine the following issues,

(i) Whether the procedure for retrenchment of the applicant's employment by the respondent was fair

(ii) Whether there was a valid reason for retrenchment of the applicant's employment

(iii) Reliefs that parties are entitled to.

On the first issue as to whether the termination of the applicant's employment was fair in terms of procedure, our guiding law is the Employment and Labour Relations Act, Cap 366 R.E 2019. Section 38 of the Act provides for termination based on operational requirements (retrenchment). The section provides that: -

> *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 to any intention to retrench as soon as it is contemplated*
>
> *(b) disclose all the 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 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 work place not represented by a recognized trade union

(iii) any employees not represented by recognized or registered trade union

The above section requires the employer to adhere to the procedure stated under section 38(1) of the Act when there is termination of the employee for operational requirements. The employer is required to comply with four mandatory principles which include giving notice of any intention to retrench, disclosure of all relevant information on the intended retrenchment, consulting prior to retrenchment and giving notice of retrenchment.

The above-stipulated procedures and principles are mandatory and have to be adhered to by the employer when the termination is by way of retrenchment. The section is in *pari materia* with Rule 23 – 24 of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007 (herein referred as GN 42 of 2007).

In the application at hand, the main contention of the applicant's counsel was that the procedure was not properly followed which resulted to the reasons for retrenchment not to be known to the applicant. He argued that, consultation was not done as per the

requirement of the law while the respondent averred that individual consultation was done.

It was the CMA's finding that the respondent complied with the procedure for retrenchment. The evidence on record shows that the respondent notified his employees including the applicant that there will be a retrenchment exercise. The evidence on record is silent as to whether there was no proper consultation that was done either to the applicant or to the trade union before carrying on with the retrenchment exercise.

Being that is the situation, it is through the evidence of PW1 and DW1 as the only witnesses who testified before the CMA which can tell us whether consultation was done or not. The evidence of PW1 is reflected on page 05 of the CMA's typed proceedings. When giving his evidence under oath, part of his testimony was as hereunder:

> *"Swl- Uliondokaje kazini?*
>
> *Jb- Mimi nilipokea simu kutoka kwa mwajiri tarehe 26/10/2020 nikijulishwa kuwa mkataba wangu umesitishwa hivyo nifike ofisini kwa utartibu mwingine tarehe 27/10/2020 asubuhi saa 2:00 niliamkia ofisini kwa mwajiri nilipofika mwajiri aliniambia mkataba umesitishwa kuanzia tarehe 27/10/2020 akanipa barua ya kusitisha*

ajira yangu naomba barua ya term ipokelewe kama kielelezo.

The above piece of evidence does not show that the applicant was consulted before retrenchment. When he was cross-examined, the counsel for the respondent did not ask anything about individual consultation as it is alleged to be done. Rather, he cross-examined the applicant to get proof of the assertion that the trade union was consulted as reflected on page 7 of the typed proceedings as it is shown hereunder:

Swl: Je NUMET walikuwa na haki ya kumshitaki mwajiri kwa kushindwa kufuata taratibu za kisheria kupunguza staff

Jb- Sijui

Swl- Siku ambayo mwajiri alisaini barua ya chama, je wewe ulikuwa umeshafukuzwa kazi?

Jb: Vyote vilikuwa siku moja kwa hiyo sijui

Clearly, the above piece of evidence does not show if consultation was conducted either to the individual employee or through a trade union. To clear the doubt on whether consultation was conducted or not, I revisited the evidence of DW1 as reflected in the CMA typed proceedings. As I went to page 10 of the said proceedings, DW1

testified that they notified their employees about the presence of the retrenchment exercise through staff *WhatsApp* group followed by the official notice that was kept in the notice board. Then they called the individual staff who are affected directly by the retrenchment exercise to communicate with them officially and that communication was done orally. The record further revealed that they got information about the applicant's being one of the employees to be retrenched on 27th October 2020 and on that day the applicant was on the way to Musoma but they also communicated with him when he returned back.

When cross-examined by the counsel of the applicant who aimed to trace if the applicant was consulted, the records bear testimony as reads out hereunder:

> *Swl- Wakati kazi inafika ukomo Johnson alikuwa bado mwairi wa Epsom*
>
> *Jb- Ni kweli*
>
> *Swl- Katika Exhibit D1 soma aya ya mwisho*
>
> *Jb- Tulisema kuwa wafanyakazi watakuwa wakwanza kuzingatiwa*
>
> *Swl- Kuna sehemu yoyote uliwaita for consulatation kwenye Exhibit D1*
>
> *Jb- Sikuwaita kwa sababu barua hii ilikuwa general kwa staff wote kwa maandishi hakuna ila tuliwapigia simu individually*

Swl- Je umeleta Ushahidi wowote wa simu au audio

Jb- Sina ila nikiangalia Ushahidi wowote wa simu au audio

Swl- Je una ushahidi wowote mbele ya Tume mlikaa na waathirika kwa ajili ya consultation

Jb- Tulikaa na individual staff baada ya kuwapigia simu ila maandishi hatuna.

Swl- Je unao Ushahidi wa chama cha wafanyakazi NUMET kupewa taarifa na kushiriki kuhusu hili tukio la consulatation

Jb- Sina taarifa hizo.

On the issue of consultation, the arbitrator's finding is that, individual consultation was conducted through their mobile phone. This finding is joined hands with the counsel for the respondent that though there is no documentary evidence to show that consultation was done but the oral testimony adduced before the CMA shows that consultation was conducted at the individual level after they have received a call from the respondent. The counsel for the respondent stressed that since the procedures are not supposed to be followed in a checklist fashion, a consultation doesn't need to be in writing what is important is the evidence that the same was conducted.

On the other hand, the counsel for the applicant strongly disputed on the assertion that the applicant was consulted. He submitted that

there was no any evidence whatsoever which shows that consultation was conducted apart from the mere oral evidence. He claimed that the affected workers including the applicant were not consulted before the retrenchment exercise.

Before I take a side on whether consultation was conducted or not, I find appropriate to explain a bit about consultation in the retrenchment exercise. In brief, consultation is one among the important procedure that employers owe a duty to do it before making any decision to retrench as it is one of the rights of an employee. It is an important stage or process in retrenchment exercise as it gives chances between the two (employer and employee) to discuss on the possible measure to eliminate or to reduces chances of losing a job or being redundant and if it is necessary to do redundancy, who should be dismissed. If the employees belong to a certain trade union, the employer is required to discuss with them on a number of issues, the aim being to reduce the chances of redundancy. During the consultation, the employer is ought to exhaust all avenues before making the ultimate decision as to whether to make redundancy. There should be a genuine attempt and meaningful engagement on the constructive dialogue discussing chances to eliminate retrenchment.

Should the employer choose not to engage in proper consultation with his employee as per the requirement of the law and the employee are in fact retrenched, this can be clearly demonstrated as unfair retrenchment.

In the case of **Omary Ali Dodo v Air Tanzania Company Limited,** Lab Revision 322/2013 this Court tries to explain the meaning of consultation by quoting with approval the holding of the Labour Appeal Court of South Africa in the case of **Visser v Sanlam** [2002] 22 ILJ 666 where it states that:

> *"...The employer and the other consulting parties must engage in a meaningful joint consensus-seeking process and attempt to reach consensus... for the process to be meaningful it must not be a mere sham a going through a motions. The employer must consult in good faith in that it must not have made up its mind prior to the consultation to dismiss. The other party* ***(i.e the employees or their representative trade union)*** *must also act in good faith, it must not merely try to prolong consultations and prevent possible dismissal.*

Reverting to our case at hand, apart from the bare words of the respondent that they conducted consultation, no any other evidence which proves that consultation was in fact done. It is a trite law that the employer has a duty to prove that termination was fair substantially and

procedurally. The evidence on record is silent as to when consultation was done. On his evidence, DW1 testified that they called the applicant on 27th October 2020 when he was on the way to Musoma. The evidence did not tell further when they made a consultation with him. Worse enough, DW1 in his testimony when he was cross-examined, he testified that he was not aware if the consultation was done.

Assuming that they have at all engaged the trade union, NUMET, for consultation, there is no even a single representative of NUMET who was called to prove the same. Likewise, there is no evidence tendered to show that at some point the employer and NUMET meet and discuss on retrenchment. It was expected at least to be seen the notice of the meeting, the attendance registers of the members who attended the meeting and the minutes of the meeting to mention a few. In short, there is nothing to exhibit that consultation was done.

The counsel for the respondent tries to convince this court that the procedure mentioned under section 38 of the Act is not to be followed as a checklist fashion, indeed that view might be absolutely correct. However, it is my firm view that consultation is one among the important procedures that should be fully adhered in order to have

meaningful engagement on the constructive dialogue between the parties.

Having said so, I totally agree with the counsel for the applicant that proper consultation was not conducted. For that reason, the first issue is answered in affirmative that the termination was unfair in terms of the procedure.

On the second issue, the counsel for the applicant challenges the reason for retrenchment. He submitted that, in absence of consultation the reason for retrenchment was not discussed. He went on to challenge the admissibility of Exhibit D3 by the arbitrator which alleging to justify the reason for retrenchment.

On his part, the counsel for the respondent submitted that Exhibit D3 explains the whole process of the retrenchment. He went on to state that as per the decision of **Bernard Gindo** (supra), section 38 of the Act and Rules 23 and 24 of the GN No 42/2007 are not mandatory to be followed in checklist, what is important is consultation which is not necessary to have a proof of documentary evidence for this court to rule out that the same was done as it is enough to state it in evidence.

In determining this ground, I find it crucial to refer to Rule 23 of GN No 42/2007 which provides that:

23(1) A termination for operational requirements (commonly known as retrenchment) means a termination of employment arising from the operational requirement of the business. An operational requirement is defined in the Act as a requirement based on economic, technological. Structural or similar needs of the employer.

(2) As a general rule the circumstances that might legitimately form the basis of a termination are; -

(a) economic needs that relates to the financial management of the enterprise;

(b) technological needs that refer to the introduction of new technology which affects works relationship either making existing jobs redundancy or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace;

(c) structural needs that arise from restructuring of the business as a result of a number of business-related causes such as the merger of businesses, a change in the nature of the business, more effective ways of working, a transfer of the business or part of the business.

(3) The courts shall scrutinize a termination based on operational requirements carefully in order to ensure that the employer has considered all possible alternatives to termination before the termination is effected.

(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) the reasons for the intended retrenchment (i.e the need to retrench) *(emphasis is mine in the bolded words)*

In the present case, the respondent alleged that reason for termination was well communicated to the applicant. While on his part the applicant asserts that since he was not consulted, he is not aware as to why his employment contract was terminated.

It is a settled position of law that the duty to prove whether there is a fair and valid reason for termination of the employee's contract of service lies upon the employer. (See the case of **Amina Ramadhani v Staywell Appartement Limited,** Revision No 461 of 2016, High Court Labour Division at Dar es Salaam).

The above-settled position of the law gets its legitimacy from section 37(1) and (2) of the Act which places a duty to the employer as

it shall be unlawful for an employer to terminate the employment of an employee unfairly.

While I agree that in deciding whether termination under the ground of retrenchment was fair, the court need not to interfere with the informed decision of the employer who had the right to execute his legitimate business plan. (See the persuasive decision of the South Africa case of **Hendry v Adcock Ingram** (1988) 19 ILJ at 92 B-C). However, it is my strong view that this right is not absolute as it is subject to other conditions including but not limited to supply adequate and proper information to the employee so as to be aware on the reason for termination as it is provided for under Rule 23(4)(a) of the GN. No. 42/2007. My mind is settled that, adequate and proper information is done by way of consultation to the intended employees to advance the reason for retrenchment so as to be not only part and parcel of the retrenchment process but also to air out their views on the possible measures to minimize the same.

I had cautiously gone through the record, unfortunately, the records do not speak if the applicant was consulted. While the law placed an obligation to the employer to consult the employee, so as to know the reason for retrenchment, as I have earlier on noted, the

evidence on record shows that this was not done as the applicant claimed that he did not know the reasons for his employment contract to be terminated and there is no proof to prove the contrary.

Upon further perusing the record at hand, in its finding the arbitrator validates the reason for termination by referring to Exbihit D3 which its admissibility was challenged in the CMA and in this court by the counsel for the applicant who prays the same to be expunged in the record. On the other hand, the counsel for the respondent stated that the reason for termination is stated under Exhibit D3 that was tendered by DW1 and properly admitted by the court.

I had time to revisit the CMA proceedings so as to satisfy myself on what transpired as far as Exhibit D3 is concerned which substantiates the reasons for termination. After going through the proceedings, when D1 was examined by his counsel, did not tender proof to show that there was a valid and fair reason for termination of the applicant, DW1 tendered Exhibit D1 and D2 which in fact does not state the reason for retrenchment. As he was cross-examined by the counsel for the respondent, in the middle of it, is when the counsel for the respondent prayed to recall witness under section 147 of the Tanzania Evidence Act, Cap 6 R.E 2019 and tendered Exhibit D3.

It is my understanding that, one among the purpose of cross-examination is to destroy the opponent party evidence built in the examination in chief. It is also on record that DW1 was challenged by the counsel of the applicant during the cross examination if he tendered any document which state the reason for retrenchment. it is from there when the counsel of the respondent prayed to recall the witness so as to tender Exhibit D3. It is my considered view; it was not proper for the witness to be recalled when the opponent party was cross-examining him as doing so it paralyzed the whole intent of cross-examination. It is my further view that a witness cannot be recalled so as to rebuild the evidence which has been destroyed in the cross-examination. For that reason, I entirely agree with the learned counsel for the applicant that Exhibit D3 was not properly admitted. Consequently, I expunge Exhibit D3 from the record as the same was not properly admitted.

After expunging Exhibit D3 from record, nothing exhibits that there was reason for termination of the applicant's contract of employment. Thus, it is my firm view that the respondent committed a grave error for failure to consult the applicant and adequately informed him on the reason for retrenchment. That is so say, I have no hesitation

to say that termination was not fair on a substantive part. Thus, this ground of revision is allowed and I hereby fault arbitrator's findings.

Now, to what reliefs are the parties entitled to? In the case of **Joakim Mwanikwa v Golden Tulip Hotel,** Revision Application No 268 of 2013 (unreported) it was held that:

> *"When employer terminates fixed term contract, the loss of the salaries by the employee of the remaining period of the unexpired term is a direct foreseeable and reasonable consequence of the employer action was loss of salary for the remaining period of the employment contract."*

According to CMA Form No 1, the applicant claimed to be paid 10 months' salary for unfair termination and subsistence allowance. On the issue of subsistence allowance, the nature of the applicant's employment does not entitle him to be paid subsistence allowance. Also, in his employment contract subsistence allowance was not among his entitlement in case of termination. Thus, the same cannot be paid to the applicant.

As it is well observed in the case of **Joakim Mwanikwa** (supra) it is a trite position of law that when an employer terminates a fixed term contract, he is entitled to a payment of the remaining period in his fixed term contract. Looking at Exhibit D2, the applicant was paid Tsh.

3,000,000/= which covers payment of Notice, severance pay, leave pay and one month salary for the month of October and repatriation costs though it was not part of his entitlement as the employer decided to pay in which I don't want to interfere it.

Thus, since I hold the view that termination was not fair substantively and procedurally, and since the applicant was employed on a contract basis renewable every year as there was automatic renewal, the applicant is entitled to be paid the salaries of the remaining ten months of Tsh. 13,200,000/= as claimed in the CMA Form No 1.

In the final analysis, I hereby hold that the application has merit. I thus. revise by quashing and setting aside the findings of the Arbitrator as the termination was not fair substantively and procedurally.

No order as to costs. It is so ordered.

Right of appeal explained.

THE HIGH COURT OF TANZANIA
MWANZA

M. MNYUKWA

JUDGE

26/07/2022

Court: Judgement delivered in the presence of the applicant's counsel and in the absence of the respondent.

M. MNYUKWA

JUDGE

26/07/2022