IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

TANGA DISTRICT REGISTRY

AT TANGA

LABOUR REVISION NO 27 OF 2019

(Originating from an Award of the Commission for Mediation and Arbitration at Tanga in Labour Dispute No CMA/TAN/40/2018/28 ARB)

ANJARI SODA FACTORY LTD.....APPLICANT

VERSUS

JOSEPH TULO SHEMBILU.....1st Respondent

MARTIN LEONARD MKABENGA.....2nd Respondent

SAID MUSA KILIMA.....3rd Respondent

RICHARD ERNEST MSAGATI .....4th Respondent

JUDGEMENT

24/05/2022

MANSOOR J

In the Commission for Mediation and Arbitration (CMA) for Tanga in Labour Dispute No. *CMA/TAN/40/2018/28 ARB*), the respondents in this case, lodged a complaint against the Applicant herein, Anjari Soda Factory Limited. According to CMA F.1 in which a formal complaint was lodged, the respondents were claiming for payments of their terminal benefits following

an unfair termination of their alleged employment with the Applicant.

In the Commission, the respondents who were the complainants therein were represented by Mr. Victor Kom, a secretary from Tanzania Union of Industrial and Commercial Workers (TUICO) while the applicant who was the respondent used the representation of Mr. Henry Mlang'a, a personal representative.

Issues framed by parties at the commission were; -

1. Whether or not the termination was for a fair reason,
2. Whether the applicant complied with procedures before retrenching the respondents,
3. To what reliefs are parties entitled.

After having heard three applicant's witnesses and two witnesses for the respondents' side, in its award, the Commission answered the first and second issues in the negative and proceeded to award reliefs as per Section 40 (1) of the Employment and Labour Relations Act, Cap 366 R.E 2019 being 12 months' salary for each, being;

1. Joseph Tulo Shembilu:- Tshs 266,200 x 12= 3,194,400/=

2. Richard Ernest Msagati:- Tshs 266,200 x 12= 3,194,400/=
3. Said Musa Kilima:- Tshs 266,200 x 12= 3,194,400/=
4. Martin Leonard Mkabenga:- Tshs 266,200 x 12= 3,194,400/=

The Applicant company was aggrieved by the CMA decision and award and sought this present revision. In the affidavit in support of the application, the Applicant jotted down matters for determination on which the revision was founded. For ease of reference the matters are;-

1. *That the arbitrator erred in law in allowing the respondents to be represented by a trade union which had not complied with the laws;*
2. *That the trial arbitrator erred in law and allowed the respondents to be represented by a trade union while they were not members of that trade union according to the laws and contrary to that trade union's constitution;*
3. *That the trial arbitrator erred in law and fact in failing to find out that there were valid reasons for retrenchment;*
4. *That the trial arbitrator erred in law and facts in failing to properly evaluating the evidence produced by the applicant*

at the trial and find out that the whole procedure for retrenchment was complied with;

The respondents filed a notice of opposition together with a counter affidavit to signify that they resist the application. They also attached a notice of preliminary objection that the application is hopelessly time barred, secondly that there was no notice of representation and three that the application is contradictory (doubt) for the date of filing and presented before the court. This was filed on 16th September 2019. Record shows that after that date, the case was called in court for several times without determination of the preliminary objections until 04th March 2021 when the matter was dismissed for want of prosecution before Mruma J. It was later restored on 18th March 2022.

On 19th April 2022, in the presence of parties through Mr. Henry Mlangá and Rajabu Jaha, the matter was set to be argued by way of written submissions.

In his submission in chief, the applicant's counsel Mr. Henry John Mlangá while adopting the grounds for revision, submitted on the main application stating that the respondents were illegally

represented in the CMA for being represented by a trade union (TUICO) which had not complied with the mandatory provisions of Section 64 (2) of Cap 366 to be granted rights to exercise organizational rights at the applicant's place of work, and the arbitrator was wrong to relate the respondents retrenchment and the misunderstandings between the trade union TUICO and the applicant.

He further stated that the arbitrator was wrong in failing to realise that the respondents were retrenched on valid reasons beyond the applicant's control. Also, that the arbitrator unreasonably disregarded the vital evidence of DW1, DW2 and DW3 which proves that such reason being the shortage of raw materials(sugar) the demand of a financial audited report as noted by the arbitrator was beyond the requirement of the law in which the employer/applicant had proved the reason for termination to the balance of probabilities. In the end, he submitted that the statutory requirements of the law were complied with in retrenching the respondents and paying them.

Submitting against the application, Mr. Rajabu Jaha TUICO Regional Secretary stated that according to section 60 (1) (a) of

the Employment and Labour Relations Act, TUICO as a trade union was acting legally. He referred this court to a letter dated 7th February 2018 from Anjari Soda Factory Ltd to TUICO (Annexture A2) welcoming the trade union to conduct a meeting with workers.

He also submitted further that since the applicant claims that the retrenchment was due to shortage of raw materials such as sugar, then he ought to have provided a report evidencing that allegation but he failed. There was also no audited financial report to show that the company was undergoing financial crisis requiring retrenchment.

He also invited the court to consider the fact that the retrenchment was done just shortly after the respondents joined the trade union. And since the respondents were frontliners in soliciting the rest of the workers to join the union that is why they were retrenched.

Rejoining, the applicant maintained his stance that since the trade union had not followed the procedure to register members its members at the applicant's company then it was wrong for it to represent the respondents.

Having so summarized what transpired in this case, I am now in a position to determine this matter. First with regard to the preliminary objections which were raised by the respondent but never submitted for or against; since the respondent who initiated the same abandoned them completely then they are dismissed accordingly. In any case, the application, since being time barred touches the jurisdiction of this court, I am satisfied that the matter was not filed out of time as it was presented for filing on 26th June 2019 which is within 42 days since the date when the award was served upon parties on 16th May 2019. This is in accordance to Section 91(1) (a) of the Employment and Labour Relations Act, Cap 366.

The major issue in this case is whether the respondents were fairly retrenched from their employment on 3rd April 2018. I have gone through the proceedings of this case at the CMA and observed that only the 1st and 4th respondents stood as witnesses on the side of the complainants at the CMA. However, TUICO through its secretaries represented all the four complainants therein. The permission to represent them can be traced in the

letter by the first respondent on behalf of the rest of the respondents, to the commission and copied to the applicant.

The second and third points of grievance by the Applicant are that the arbitrator erred in law in allowing the respondents to be represented by a trade union which had not complied with the laws. Also, that the trial arbitrator erred in law in allowing the respondents to be represented by a trade union while they were not members of that trade union according to the laws and contrary to that trade union's constitution.

Going through the proceedings I have seen that there are correspondences between the trade union and the factory that clearly goes against the allegation that there was no agreement on the trade union conducting its business within the factory.

Considering Exhibit R1 collectively being a letter from TUICO to the applicant dated 23rd January 2018 Yah: Chama cha TUICO kuingiza wanachama na kufungua tawi and TUF 14 (Notification to exercise organisational rights), Exhibit R2 being a letter from TUICO to the Applicant dated 23rd February 2018 Yah: Makato ya Ada ya TUICO asilimia mbili 2% ya mishahara yao toka kwa wanachama wapya kumi na saba (17) wa Anjari Soda and TUF

15 for each of the respondents above, Exhibit R3 a letter from TUICO to the applicant, dated 23/02/2018, Yah: Maombi ya kufanya mazungumzo baina ya TUICO mkoa na uongozi wako tarehe 01/03/2018 saa 05:00 asubuhi, Exhibit R4 a letter from the applicant to TUICO dated 27th February, 2018 Re: Appointment on 1st March 2018 and Exhibit R5, a letter from the applicant to TUICO dated 13th March 2018, Re : Notice of Default and Contravention of Laws; all these verify that the activities of the trade union were known and condoned by the applicant.

Organisational Rights are covered by Section 59 to 65 of The Employment and Labour Relations Act. The relevant provision here is Section 64 of the Act. It provides for the procedure by which a trade union can exercise organisational rights at a working place. It goes as thus:-

> *(1) Any registered trade union **may** notify an employer in the prescribed form that it seeks to exercise a right conferred under this Part.*
>
> *(2) Within 30 days of the receipt of a notice under subsection (1), the employer shall meet with the trade union to conclude a collective agreement granting the right*

and regulating the manner in which the right is to be exercised.

(3) Where there is no agreement or the employer fails to meet with the trade union within 30 days, the union may refer the dispute to the Commission for mediation.

(4) Where the mediation fails to resolve the dispute, the trade union may refer the dispute to the Labour Court which shall make appropriate orders.

(5) Any dispute over the interpretation or application of an order made under this section shall be referred to the Labour Court for decision.

The applicant has not stated which provision was not complied with by the TUICO. From the correspondences shown above, which were tendered as exhibits at the CMA it is obvious that TUICO's efforts to meet the administration of the applicant company proved futile. The law under Section 64(1) provides that the trade union may...and does not place a mandatory requirement of notifying the employer in the prescribed form that it seeks to exercise the right. Nevertheless, there was enough

exchange of communication from TUICO to the applicant on this subject.

According to the Employment and Labour Relations Act under Section 60.-*(1) Any authorised representative of a registered trade union shall be entitled to enter the employer's premises in order to—*

(a) recruit members;

(b) communicate with members;

(c) meet members in dealings with the employer;

(d) hold meetings of employees on the premises;

(e) vote in any ballot under the union constitution.

In the circumstances, the applicant cannot be heard saying that he was not notified on the recruitment of its members by TUICO. One of the entitlements of a trade union is to recruit members.

Moving to the fourth and fifth ground that is whether retrenchment was for a valid reason. Termination from employment for operational requirements (retrenchment), can be legal. However, procedures encompassed under Section 38 of

the Employment and Labour Relations Act, 2004 and Rules 23 and 24 of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007, must be adhered to. Section 38 of the ELRA states; -

(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.

(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 the mediation has failed, the dispute shall be referred for arbitration which shall be concluded within thirty days during which period no retrenchment shall take effect and, where the employees are dissatisfied with the award and are desirous to proceed with revision to the

Labour Court under section 91(2), the employer may proceed with their retrenchment.

It is evident from record that none of the above procedure was followed. Even though the procedure would have been followed, still it would have been defeated by the fact that there was no valid reason for retrenchment of the respondents at all. An employer must have a valid reason for retrenchment in order to follow a proper procedure in the said retrenchment.

The applicant alleges that there was no connection between the respondents joining a trade union and their retrenchment from employment. Yet, the series of events are alarming. On 23/01/2018 TUICO commenced communication with the applicant concerning recruitment of its employees in the trade union. By then all was well with the factory business. On 14th February all the four respondents filled TUF 15 which instructed the employer to deduct dues of a registered trade union (TUICO) from employee's wages. This exchange of communications continued until 24th March 2018 and all of a sudden on 03rd April all the four respondents, being members of TUICO were retrenched. What a coincidence.!

It was upon the applicant to prove at the CMA that there really was shortage of raw materials, or financial downturn of the factory. 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."*

It is true that although 17 members joined TUICO, only four were retrenched. I agree with the respondent that the evidence available connotes that the four respondents were retrenched to

deter other workers from joining any trade unions. Section 37 (3)(a) (iv) of the Employment and Labour Relations Act, 2004 provides that it shall not be a fair reason to terminate the employment of an employee for the reason that the employee belongs, or belonged, to any trade union.

In the award, the learned arbitrator reasoned,

> *"....the respondent during this arbitration never ever brought any proof of shortage of sugar. He did not bring any proof of sugar import ban from the government as he alleged. He did not bring any audited financial statement of his company to show financial position of the factory at the time of retrenchment. These are apparent intimidations from the employer to his employees who have become members of the trade union. There were reasonable grounds to believe that complainants were targeted for the alleged retrenchment due to their trade union affiliation"*

A labour court when exercising its revisional jurisdiction, revises proceedings of the arbitral tribunal where among others, it acted on material irregularity or there has been material errors

involving injustice. In this case I find no material irregularities that calls for this court's intervention.

That said, this application for revision fails. The Arbitrator was right to hold that the Respondents' termination was both substantively and procedurally unfair. The arbitral award is accordingly confirmed. No orders as to costs.

DATED AND DELEIVERED AT TANGA THIS 24TH MAY, 2022

LATIFA MANSOOR

24TH MAY, 2022