IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LABOUR REVISION NO. 38 OF 2021

NAS DAR AIRCO CO. LTD ..... APPLICANT

VERSUS

EMMANUEL IGONDA & ANOTHER..... RESPONDENT

JUDGMENT

Last Order: 24/3/2023
Judgment: 29/3/2023

MASABO, J.:-

NAS DAR AIRCO CO. LTD, the applicant herein, is aggrieved by a decision of the arbitrator in a labour dispute with No. CMA/HAI/ARB/83/2020 before the Commission for Mediation and Arbitration (CMA) which found her to have unfairly retrenched the respondents herein. She is also aggrieved by a subsequently award of a a sum of Tshs 15, 000,000/= comprising of 12 months salary for the two respondents. He has knocked the doors of this court by way of a revision filed under section 91(1)(a), (2)(b), and section 94(1)(b)(i) of the Employment and Labour Relations Act [Cap 366 RE 2019] and Rule 24(1), 2(a) and (b), (c), (d), (e) and (f) and (3)(a), (b) and (d) and Rule 28(1)(c), (d) and (e) of the labour Court Rules, 2007 [GN No. 106 of 2007].

In her notice of application, she has prayed that this court be pleased to call for the record and revise the proceedings of the Arbitrator of the above stated dispute and, upon revising the said proceedings:

i. declare that the arbitrator erred in law and facts by failing to consider and evaluate the applicant's evidence;
ii. declare that the arbitrator erred in law and fact in holding that the respondents were unfairly terminated;
iii. declare that the respondents were fairly terminated;
iv. nullify, quash and set aside the award made in favour of the respondents; and
v. grant any other relief it may deem fit and just to grant.

Hearing of the application proceeded in writing. Both parties had representation. Mr. Arnold Peter, learned counsel appeared for the applicant whereas the respondent enjoyed the service of Mr. Lucas Nyagawa, learned counsel. The submissions were all filed on time and I commend the counsels for that. Before dwelling on the written submissions, I will briefly narrate the background facts to set the ground. The respondents were employed by the applicant and worked for him on different capacities at Kilimanjaro International Airport (KIA) until 13/6/2020 when they were retrenched in response to operational difficulties caused by flight cancellations during the Covid 19 pandemic. Unhappy with the retrenchment, the Respondents successfully challenged it in the CMA, hence this appeal.

In support of the application Mr. Peter submitted that there are four issues to be determined. On the first issue whether the applicant complied with the procedure for retrenchment, he submitted and argued that the procedures for retrenchment as stipulated under section 38 of the Employment and Labour Relations Act read together with Rule 23 of the Employment and Labor Relations Act (Code of Good Practices) GN 42/2007 were duly complied with. The applicant issued a general staff notice on 10/6/2020 to all employees calling upon them to attend a consultation meeting scheduled on 12/6/2020. The notice was preceded by a consultation meeting held with the trade union on 8/6/2020 and on 13/6/2020, the employee conducted a one-on-one meeting with the affected employees but for the reasons best known to the respondents, they forfeited their right as they did not attend the meeting. Hence, there was full disclosure and the employer was wrongly condemned to have flawed the procedural requirements.

Mr. Peter proceeded that the second issue regards the appropriateness of the virtual consultation meeting. He submitted that there was nothing wrong for the staff meeting to be conducted virtually through skype as it was medically sound to have the meeting conducted virtually to avoid the advent of Covid 19 pandemic. Besides, he added, there is no law prohibiting virtual staff meetings. On the third point, he submitted that the arbitrator erred by failing to distinguish the termination notice and the general staff notice on retrenchment. The two, he argued, are separate and are governed by different provisions. Section 38(1)(a) of the Employment and Labour Relations Act deals with notice in respect of a contemplated retrenchment

while section 41(1)(b)(ii) of the same Act deals with termination notice. Fortifying his submission, he cited the decision of this court in **Resolution Insurance Ltd v Emmanuel Shio & Others**, Labour Revision No. 642 of 2019, HC (Labour Division) in which it was held that there is no specific duration for the notice issued under section 38(1)(a) and that the circumstances of the particular case is the determinant factor of the duration of the notice. Thus, in the circumstances of this case, two days' notice was sufficient as the aviation industry was severely hit by the pandemic.

Moreover, he submitted that the arbitrator ignored the fact that the trade union and the respondent frustrated the consultation process by forfeiting their right of attendance and engagement in the second consultation meeting. As there was proof that the notice was issued, the respondents none attendance at the meeting cannot negate the consultation done at the said meeting. The decision of this court in **Tanzania Building Works Ltd v Ally Mgomba & 4 Other**s, Labour Revision No. 305 of 2010, Labor Court Case Digest LCCD-2011-2012, was cited in fortification of an argument that the employee, just like the employer has a duty to engage and undertake consultations in good faith. Where the employee frustrates such consultations by refusal to attend the consultation meeting or participate in the consultation, the employer shall be deemed to have complied with the procedural requirement for entrenchment. Lastly, on the award, Mr. Peter submitted that the award of Tshs 15, 336,000/= was erroneous as the respondents were fairly and procedurally retrenched. Thus, it should be quashed and set side.

Rebutting the submission, Mr. Nyagawa consolidated the 1st, 2nd, 3rd and 4th issues and submitted that retrenchment has substantive and procedural requirements. The procedural part has two stages which must be observed when a retrenchment is contemplated. The first is issuance of an entrenchment notice and consultation. Both are provided under section 38 of the Employment and Labour Relations Act and Rules 23 and 24 of the Code of Good Practices. Amplifying his point further, he argued that, the requirement set under the provisions should not be applied in a checklist fashion but rather in a fair, adequate and proper manner as held in **Benard Gindo & 27 others vs TOL Gases Limited** (2013) Labour Court Case Digest 20. Referring to the definition of the words 'fair and adequate' as defined in Black's Law Dictionary 8th edition, he argued that the word 'fair' means 'impartial, just and equitable' whereas on the other hand, the word 'adequate' means 'satisfactory' as per Oxford Dictionary 10th Edition.

He proceeded that the consultation process employed by the applicant was neither fair nor adequate as there was no notice to the union which would have set a ground for the consultation. The essence of the notice, he argued, is to prepare the employee of the forthcoming. Thus, the failure to render notice was fatal. As for the consultation meeting, it was submitted that, only one representative attended the purported first consultation meeting on 8/6/2020. The representation was certainly inadequate. Since there were 80 employees, there ought to have been 10 representatives as per section 62(1) of the Employment and Labour Relations Act. Further, there was no disclosure of relevant information of the intended retrenchment.

Consequently, the consultation cannot be said to have been proper, fair and adequate. He argued further that the union was not afforded an opportunity to report to the employees about the consultation meeting contrary to Rule 23(6)(a)(b) and (c) of the Code of Good Practices. He added that, since the employees were operating on shifts, the general notice of 2 days cannot be considered to have been reasonable. In support he cited the decision of this court in **Nas Dar Airco Co. Ltd vs Gift Robson& 8 Others**, Labour Revision No. 7 of 2021, in which my sister, Simfukwe, J, upheld the decision of the CMA holding that, the consultation process was flawed. On the fifth issue, he briefly submitted that the award is well founded as it is among the available remedied for unfair termination under section 40 of the Employment and Labour Relations Act.

Having dispassionately considered the submissions by both parties and thoroughly read the CMA record, it is evident that the parties do not dispute the retrenchment. Their contention is on procedural irregularities asserted by the respondents and disputed by the appellant who has maintained that the retrenchment proceeded in fully accord with the procedures ascribed under section 38 of the Employment and Labour Relations Act read together with Rule 23 and 24 of the Employment and Labor Relations Act (Code of Good Practices) GN 42/2007. Thus, the ultimate issue to be answered in the four issues raised by Mr. Peter, is whether the entrenchment was marred by procedural irregularities and whether it was rendered a nullity by these irregularities. In determining this issue, I am expected to examine the fairness of the retrenchment process. This is because, as correctly remarked

by George Ogembo in his book titled 'Employment Law Guide for Employers', 2018 at 339 as cited in **Resolution Insurance Ltd v Emmanuel Shio & Others** (supra), even if the termination is for a fair reason, it can be deemed unfair if the employer did not act reasonably or offended the procedural steps for a fair redundancy.

In determining the procedural fairness, regard must be to the procedural steps ascribed under Section 38(1) of the Employment and Labour Relations Act read together with Rule 23(4) of the Code of Good Practices. These provision which lay at the very center of the present application imposes a mandatory obligation for consultation and issuance of notice of the contemplated redundancy. In particular, section 38 of the Employment and Labour Relations Act states thus:

> 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 recognized trade union;

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

Rule 23(4) of the Code of Good Practices which is more or less a replica of the above provision amplifies the procedure and sets out its purpose in the following terms:

> Rule 23(4) the obligation 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);
>
> (b) any measures to avoid or minimize the intended retrenchment such as transfer to other jobs, early retirement, voluntary retrenchment packages, lay off etc;
>
> (c) criteria for selecting the employees for termination, such as last-in-first-out (LIFO), subject to the need to retain key jobs, experience or special skills, affirmative action and qualification;
>
> (d) severance pay and other conditions on which termination took place; and
>
> (e) steps to avoid the adverse effects of terminations such as time off to seek work.

From these two provisions it is fairly obvious that the notice and consultation are not cosmetic but a vital joint problem-solving forum by which the employer and the employees jointly seek consensus on the reasons for retrenchment, avoid it and where unavoidable, prevent or minimize its adverse effect by identifying and reaching consensus on the criteria for selecting employees to be retrenchment, the timing of the retrenchment, severance and other conditions for terminating the employees' contracts etc. This is particularly important because, loss of job through retrenchment is not a light matter. It has deleterious impact on the lives of workers and their family.

Turning to the case at hand, in their respective submissions, the parties agree and so do I, that as per the available authorities, the procedures set out under the provisions above need not be applied in a checklist fashion but rather in a fair, adequate and proper manner (see **Metal Products Limited v Mohamed Mwerangi & 7 others** Labour Revision No. 148 of 2008, **Mainline Carriers Ltd v Deluifrida Filbert Libaba & 7 Others,** Labour Revision No. 264 of 2019, HC Labour Division, and **Benard Gindo & 27 others vs TOL Gases Limited** (supra). It is also incontrovertible that a notice was issues and there was a consultation process comprising of two meetings. The first was conducted virtually through skype on 8/6/2020 and attended by 4 people who are the applicant's Human Resource Manager (PW1), its Station Manager for KIA (PW3) and DW3 (COTWU (T) representative (see Exhibit RE1). This was followed by a general staff meeting held 4 days later on 12/6/2020 (see exhibit RE3). In between these

two meetings, a notice of retrenchment was issued on 10/6/2020 (Exhibit RE2) notifying the employees of the contemplated retrenchment and calling upon them to attend the general staff meeting on 12/6/2020.

In the applicant view, the notice and the two consultation meetings sufficed the requirement of the provisions above. Further, it has been argued that, much as the time for consultation might appear short, there are no flaws as the law does not specify the time within which to conduct and finalize the consultation process. According to Mr. Peter, as the circumstance of the particular case is a determinant factor of the duration of consultation, in the present case in which the retrenchment was necessitated by the devastating effects of the Covid 19 pandemic, a period of 2 to 4 days was sufficient. Mr. Nyagawa is of the different view. He has argued that much as the law does not prescribe a specific time for notice, the notice need be sufficient and reasonable, meaning that it should give the employees sufficient time to consult among themselves and with their respective union.

From the provisions above, it is obvious that, notification of the contemplated retrenchment is a vital requirement and a precursor to the retrenchment process. It is the trigger of the consultation process hence the requirement that it be issued as soon as the retrenchment is contemplated and that it must disclose all the relevant information on the intended retrenchment. Its importance is underlined by the fact that, it gives the employees and their representatives if any an opportunity for preparation and meaningful participation in the joint problem-solving meetings. As correctly held by this

court in **Resolution Insurance Ltd v Emmanuel Shio & 8 Other** (supra) to which I fully subscribe:

> Notification entails to provide the employers concerned or representation in good time with relevant information including the reasons for the termination contemplated, number of workers and the categories likely to be affected and the period over which the retrenchments are intended to be carried out. It also gives workers or their representatives as early as possible an opportunity for consultation on measures to be taken to avert or minimize the terminations/retrenchment and the measures to mitigate the adverse effects of any termination on employees concerned such as finding alternative employments.

In this context, hastily agree with Mr. Nyagawa that, much as the law does not prescribe the time of the notice, notification for retrenchment need be reasonable so as to give the employees an opportunity to consult amongst themselves and with their respective union if any with a view of forming an informed opinion on the reasons of the retrenchment its appropriateness or otherwise and contributing actively in the joint problem-solving consultation processes. While there is no universal definition of what is reasonable, reasonability must be assessed based not only on the prevailing circumstances but the purpose for which the notice seeks to serve. Applying this test to the instant case, I find it obvious that, the two days' notice, that the notice issued on 10/6/2022 requiring the employees to attend the General staff Meeting on 12/6/20222, was insufficient and unreasonable.
As correctly argued by Mr. Nyagawa, the notification did not provide adequate time for employees to consult amongst themselves and with the union. It similarly denied the union representative, an opportunity to

communicate to the employees what transpired during the 8/6/2020 meeting. In so doing, it denied the respondents and their representative an opportunity to engage actively in the consultation process hence offensive of the rationale behind section 38 of the Employment and Labour Relations Act.

Mr. Peter has invited this court to find that, in the given circumstances the notice was adequate and to condemn the respondent and the union for frustrating the consultation. I outrightly reject the invitation to fault the arbitrator on this point because even if I were to agree with him, just for the sake of argument, that the 2 days were sufficient, I will have no room to fault the Arbitrator as the submission that the respondents maliciously frustrated the consultation process and forfeited their right is unsubstantiated. The record has it that, the notice was not sent to individual workers but was placed on notice board. Under the premises, and in the view of the undisputed fact that at that material time the workers were working on shifts, the argument that some of the workers who had no shifts on 10th and 11th June 2022 might not have seen the notice, cannot be considered a farfetched fact.

Regarding the appropriateness of the virtual consultation meeting, it is the appellants view that, the it was appropriate considering the prevailing environment whereas on the other hand, the respondent has argued that it was not. To resolve this, I have found the decision of the Labour Court of South Africa in **Food and Allied Workers Union (FAWU) v South**

African Breweries (Pty) Ltd (SAB) and Another (J435/20) [2020] ZALCJHB 92; (2020) 41 ILJ 2652 (LC) (28 May 2020), highly persuasive. In the said case, the applicant was challenging a consultation meeting contemplated to be conducted through zoom. The court had this to say:

> "With the new normal, lockdown period during COVID-19 pandemic zoom is the appropriate form in which meetings can take place. What is involved in this period is the health and safety issue. Thus, the usage of the zoom application is not panoply. It is a necessary tool to ensure that the restrictions like social distancing as a measure to avoid the spread of the virus are observed. Much as the applicant has its convenient preferences, those preferences are self-serving and are ignorant of the bigger issue of health and safety. Therefore, in my view, there is nothing procedurally unfair if a consulting party suggests the usage of the zoom application or some other form of video conferencing. This accords with the new normal and is actually fair." [emphasis added].

I fully subscribe to this view. No dispute, COVID-19 brought a new normal which accelerated the digital transformation currently experienced in almost every sector. Many governments and businesses have now turned to digital platforms and solutions such that, it is now very common to hear such terminology as e-government, e-justice, digital economy, digital finance, digital health, digital education etc. With this new reality and unless there are practical difficulties or other anomalies of concern, it would be absurd to discredit consultations conducted virtually. In the present case, I find the

coram of the virtual meeting to be of greatest concern considering, as argued by the respondent's counsel, retrenchment was contemplated of many persons but only one representative was invited/participated in the first meeting the other three members being from the employer's side.
As for the second consultation meeting, considering what I have already demonstrated above, I see no need to dwell on it. It suffices just to add that, in addition to the procedural irregularities above stated, it is intriguing why after the 12/6/2020 meeting, the respondent were not called to the one on one consultation although the same had been scheduled to be held on 13/6/2020.

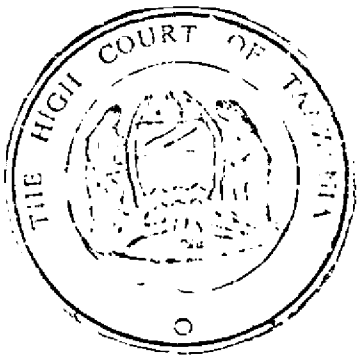
Needless to add, much as the Covid 19 pandemic had devastating economic effects which engineered loss of jobs through retrenchments, among others, it did not render nugatory the mandatory procedures and steps for retrenchment. They remained intact and employers were not exempted from adherence whenever a retrenchment was contemplated. As alluded to earlier on, retrenchment has deleterious impact not only on the lives of the retrenched employees but that of their respective facilities. It is, therefore, imperative that it should not proceed in disregard of the mandatory legal requirements

Lastly, with regard to the award, there is nothing to fault the arbitrator because, as correctly submitted by Mr. Nyagawa, the award granted to the respondents is among the remedies provided under section 40 of the

Employment and Labour Relation Act to which the arbitrator is clothed with jurisdiction to award in cases involving unfair termination.

In the foregoing, the appeal fails and is dismissed.

DATED and DELIVERED at MOSHI this 29th day of March 2023.



X

J.L. MASABO

Judge

29/3/3023