IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

LABOUR REVISION NO. 19 OF 2022

(Arising from Labour Dispute No. CMA/MZ/2013/2019 &/2007/2019

OFF-GRID ELECTRIC TANZANIA LTD .....APPLICANT

VERSUS

GODFREY YATABU.....RESPONDENT

JUDGMENT

7th March & 2nd June, 2023

ITEMBA, J.

The respondent was employed as a senior service officer by the applicant, a company working in providing renewable energy access to off grid households in Mwanza. On 30th April 2019, the applicant issued a notice of intention to retrench employees, citing three challenges namely sales growth, operational inefficiency and cost of sales which necessitated the restructuring of the company. Consultative meetings were conducted on 10th May 2019, a 'separation and release agreement' was signed by each party and the appellant served some employees, the respondent included, with letters of termination of employment for operational requirement (retrenchment). However, while some 202 employees accepted the offered payments and closed the business with the appellant,

the respondent was unsatisfied with the retrenchment. Therefore, he lodged complaints with the Commission for Mediation and Arbitration (CMA), challenging the retrenchment in both substance and procedure. According to CMA form no. 1, the respondents alleged that there was no valid reason for substantive retrenchment and that procedure for retrenchment was not properly adhered.

At the CMA the witness from the respondent's company alluded that consultative meetings were conducted via zoom and the Director explained the reasons for retrenchment, and after that a notice of retrenchment was issued. He produced exhibits including the copies of the contract of employment, invitation letter to attend consultative meetings, notice of contemplated retrenchment, notice of termination of employment, invitation to attend a consultative meeting, attendance sheets and minutes for the meeting, termination letter, employee exit and clearance forms and separation and release agreement.

The respondent admitted to have attended the consultative meetings and signed the termination letter and separation agreement but he did not agree to retrenchment procedure. At the end the CMA concluded that the

ground for retrenchment was restructuring but there was neither proof of the old structure nor the new structure despite one of the employees asking for it. Therefore, the respondent was retrenched for unfair reason and that, although it appears the procedure was complied with, where retrenchment is adjudged to be unfair, procedure becomes nugatory. The respondent was awarded 12 months remuneration amounting to TZS 16,489,752/=.

Aggrieved, the applicant has filed this revision application coupled with 6 grounds which can be abridged as follows: -

i. *The first ground; that the CMA erred in entertaining the respondent's dispute without having jurisdiction.*

ii. *The second to fifth grounds; that the CMA erred in holding that the applicant terminated the respondent unfairly despite the fact that the respondent was involved in all the consultative meetings process and he never complained to CMA in the process of retrenchment.*

iii. *The sixth ground that the CMA erred in awarding the respondent an amount of TZS 16,489,752/= as compensation without considering that he was already paid his terminal benefit amounting to TZS 7,764,412/=*

At the hearing, both parties were represented by learned counsels; Mr. Lubango Shiduki was for the applicant while the respondent enjoyed the services of Mr. Erick Mutta.

Arguing for the application Mr. Lubango argued the 1st to 5th grounds jointly. He told the court that they are challenging the jurisdiction of CMA. That, according to the CMA Form no. 1, the ground for application was unfair termination due to retrenchment and this was also stated at page 7 of CMA award. He added that the respondent was involved in the whole exercise of retrenchment and he was paid all his dues; and he signed the separation agreement (annexure 5). That, if the respondent agreed to sign annexure 5 basically, he agreed on the retrenchment. He argued that section **38(2) of the Employment and Labour Relations Act, Cap 366** (**ELRA**) states that when there is no agreement on retrenchment a party can file reference before CMA. The applicant's counsel concluded that as the respondent did not object from the beginning and he was paid his dues, then the CMA did not have jurisdiction to entertain his matter. He also cited the High Court case of **Elizabeth O. Chigale v Thinamy E. Ltd** Lab 13/2022 page 20 which provided that the CMA did not have power to attack the process of retrenchment as that stage was passed already.

In respect of the 6th ground, he submitted that the relief granted to the respondent is not justified because he was already paid terminal benefits as agreed. He added that the CMA had no jurisdiction to issue double payment which is not substantiated. He finally prayed for the court to nullify the CMA proceedings because it acted without jurisdiction.

In reply, Mr. Mutta strongly opposed the application. He argued that, according to the applicant's submission, the main issue is that the respondent was not supposed to file his claim at CMA. He agreed that Section 38(2) ELRA gives the condition that there must be misunderstand during negotiation before referring the dispute to CMA. However, he argued that, the law does not state who should file the case if there is no agreement during consultation and in his opinion, it should be the employer, because he is the one who is dictating the beginning and ending of the process. He added that even in the cited case **of Elizabeth Owen Chigala** at page 20, the court said it was the employer **Thinamy Entertainment Ltd.** who had a duty to file the dispute at CMA after consultation failing. He stated that the referred decision gives relief to the respondent.

He went on to state that, there is no dispute that at CMA there was evidence that some of employees asked for retrenchment to be withheld but it proceeded and as a result, the respondent became a victim. That, in retrenchment process there is more than consultation, there are other issues in terms of **Sharaf Shipping Agency v Bacilia Constantine and 5 others** Civil Appeal No. 56/2019 Court of Appeal of Tanzania Dar es Salaam. He did not mention the said issues. He finally prayed for the CMA decision to be confirmed.

In his brief rejoinder by Advocate Lubango stated that section 38(2) ELRA is not silent as to who should move the CMA but it leaves the room to any party which is unsatisfied to refer the dispute to CMA therefore, if respondents were not satisfied, they were supposed to go to CMA immediately before finishing consultation.

Having dispassionately considered the submissions from both parties and records of this application, the issue is whether the application has merit.

In determining the application, it will be noted that all the grounds were argued jointly as they are interring related, expect for the last

ground. I will proceed in the same manner. I will be guided by the provisions which lays the procedure for retrenchment which are section 38 (1) of the **Employment and Labour Relations Act** (ELRA) 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 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.'** (Emphasis supplied)*

In respect of the first ground, I agree with the applicant's counsel that a party cannot refer a dispute at CMA if there was an agreement to retrenchment as per section 38(2). The counsel for the applicant has argued that the respondent agreed to the retrenchment as he was involved in the whole process of retrenchment, he signed the separation agreement and he was paid all his dues. I have gone through the said signed documents, and part of the termination letter states that;

"……. after a careful consideration of all the above, it is with deep regret that your role is one of the positions affected by this retrenchment exercise and therefore you will be officially terminated from employment effective from 10th May 2019.

> *You will be paid all your terminal benefits as stipulated by the relevant labour law (sic) ……*
>
> *Attached to this letter is a* ***Release Agreement, Final Dues Form and clearance form in which you will be required to complete*** *the clearance procedure as per the company policy including ensuring that all the company properties (if any) under your custody are handed over to your line manager effective immediately* ***so that your terminal dues are immediately paid****'. (Emphasis added)*

This the termination of employment letter is drafted in a way that in order for the employee to access his terminal benefits which are his statutory rights, he also has to sign that he agrees to termination through retrenchment. Based on the said letter, it does not appear that the respondent had an option not, to sign it. The said 'Separation and Release agreement' is termed voluntary but practically, it was not because it is part and parcel of the terminal benefit payments. This means, the employee might intend to sign it for the purpose of receiving his terminal benefits but once he signs, he has also automatically agreed to termination through retrenchment. Yet, an employee needs to sign the documents to avoid the

risk of losing his terminal benefit. I am of the considered view that, these two types of agreements are of different nature and purposes one is for receiving the benefit and the second is for agreeing on the retrenchment. The two agreements should not be blanketed together but be separate and clear for the employee to understand and decide accordingly. Otherwise, the process remains unfair and unjust to the employee. That, said there was no lawful agreement made between the applicant and the respondent on retrenchment process and it was proper for the dispute to be referred to the CMA.

Although the applicant did not submit on the substantive fairness of the termination, I would agree with the CMA decision that, the old and new structure was not disclosed to the employee despite one of them asking for it. I am alive to the legal principle that these various stages of retrenchment are not meant to be applied in a checklist fashion, rather are meant to provide guidelines to ensure that consultation is fair and adequate. See **Rweikiza and 11 others v Bs Stanley Mining Service** Revision No. 23/2012 Hon. Rweyemamu, J (as she then was). Nonetheless, if there was a demand from an employee for certain information, the employer had a duty to disclose it in terms of section

38(2)(b) of the ELRA, failure to that makes the retrenchment procedure unfair. If I may quote the decision cited by the respondent's counsel in **Sharaf Shipping Agency (T) Ltd.** at page 14, Hon. Kitusi J.A states that *'there could not be an agreement where the reasons for retrenchment had not been proved.'* As in the present dispute there was neither agreement nor valid reasons for retrenchment, the 1st to 5th grounds of application are dismissed.

The 6th ground is related to the CMA issuing double payment to the respondent the statutory benefits and compensation. Because it has been resolved that the termination was unfair, the respondent deserved the compensation, as of right. As the award of 12 months' salary as compensation is the minimum under section 40 of the ELRA, I cannot disturb it. The end result is that, this application is devoid of merits. It is dismissed, with no order as to costs, this being an employment dispute.

It is so ordered.

Right of appeal duly explained.

DATED at **MWANZA** this 2nd Day of June, 2023.

L.J. ITEMBA
JUDGE

Judgment delivered under my hand and seal of the court in the presence of Mr. Eric Mutta counsel for the defendant and Ms. Glad Mnjari, RMA.

L.J. ITEMBA
JUDGE
2.6.2023