IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

(CORAM: R.E.S. MZIRAY, J., I.S. MIPAWA, J., L.L. MASHAKA, J.)

CONSOLIDATED REVISION NO. 78A OF 2008

BETWEEN

TANESCO.....APPLICANT

VERSUS

DONATUS CHAWE SANGA & 443 OTHERS .....RESPONDENTS

AND

REVISION NO. 78B OF 2008

BETWEEN

DONATUS CHAWE SANGA & 443 OTHERS.....APPLICANTS

VERSUS

TANESCO.....RESPONDENT

(From the original decision of Hon. C.E.R. William, Deputy Chairman, dated 18/07/2007 Trade Enquiry No. 81 of 2006)

JUDGMENT

02/03/2015 & 09/02/2016

Mipawa, J.

There are two revision applications filed by the parties challenging the decision of the Hon. Deputy Chairman of the Industrial Court of Tanzania[1] (William, Deputy Chairman) ***videlis*** Revision No. 78A of 2008

[1] See Uchunguzi wa Mgogoro No. 1 wa Mwaka 2006 Baina ya Donatus Chawe na wenzake 443 na TANESCO Uamuzi per William Naibu Mwenyekiti

between TANESCO[2] and Donatus Chawe Sanga 443 others and Revision No. 78B Donatus Chawe Sanga and 443 Others V. TANESCO[3].

The two revision applications have been however consolidated and the question of numbers of the employees was resolved in which this Court granted the prayer by applicant to amend the number of employees concerned in the application for revision which was 757 ie. Donatus Chawe Sanga and 757 others[4].

However before proceeding further to the submission of both parties before us, it is important to comprehend what transpired in the Industrial Court of Tanzania (now defunct). The applicants Donatus Chawe Sanga and 433 others filed a trade inquiry through the Commissioner for Labour[5], who forwarded the dispute to the Industrial Court of Tanzania under S. 8 (a) of Cap 60 RE. 2002 so as to inquire on the following ***interalia*** and give an award thereof:-

(a) Whether the respondents employees were voluntarily retrenched.

(b) If the procedure to retrench the respondents employees was followed.

(c) If the retrenchment exercise was coated with threats.

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[2] TANESCO refers to Tanzania Electric Supply Company

[3] Revision No. 78B of Donatus Chawe and Others V. TANESCO

[4] Ruling of this Court in Donatus Chawe Sanga and 767 others Vs. TANESCO, Revision No. 78B of 2008. Aboud, J., Wambura, J. and Mipawa, J. per Mipawa, J. where this court held "...with great respect to the learned counsel...we overrule his objection and consequently grant the applicant's prayer to amend the number of respondents as prayed..."

[5] Under S. 8 (a) of the Industrial Court Act Cap 60 RE 2002 the Labour Commissioner may require the Industrial Court to make an inquiry on a Trade Dispute

(d) Whether or not the employer used "vishawishi" in order to convince the respondents employees to volunteer for retrenchment.

The gist of the matter was that a company known as Net Group Solution (a private company) took into charge the administration of TANESCO in lieu of the old administration following the Government intention to restructure TANESCO allegedly, it was argued that the Net Group Solution was forcibly infiltrated into TANESCO Offices under gun point and threats. Then Net Group Solution restructured TANESCO into three groups or parts namely; Distribution (*Usambazaji*), Generation (*Uzalishaji*) and Transmission (*Usafirishaji*) that was sometime in May, 2002.

What followed thereafter was the retrenchment of the employees. According to the employees the company prepared and sent to each department a register which showed the total number of employees to be retrenched. It was ordered by the company, the Net Group Solution that every employee who wanted to be retrenched or not to be retrenched should sign in the register. The employees were frightened and hence felt that the Net Group Solution or TANESCO at large faulted the procedure to retrench them.

On the other hand the employer TANESCO reiterated that the structure of the company ie. restructuring was contermplated mainly for privatization which was endorsed by the TANESCO Board of Directors in

March 2004 and the retrenchment of the employees that was implemented by TANESCO in 2003 was voluntarily and it was not forcibly done.

The Learned Deputy Chairman (William, D.P) after hearing the parties by written evidence and ***viva voce*** cross-examination ruled that; on the first issue the employees were not voluntarily retrenched "*hawakupunguzwa kwa hiari yao hasa*" other employees like Veneranda Akonaay for example were returned to the Ministry of Energy and Mineral but later on retrenched under pretext that they had volunteered.

The Learned Deputy Chairman on the procedural fairness which was issue number two ruled that procedure before retrenching the employees was flawed. The Collective Agreement *Mkataba wa Hiari* (Voluntary Agreement) though it stipulated under items 5.0 and 5.5 that there has to be consultative committee (*Kamati ya Majadiliano*) which was to be composed of members from the employer and TUICO[6], Trade Union. There was no evidence to prove that the committee was formed or the date it was convened for purpose of consultation. It was the Learned Deputy Chairman decision that the employer did not comply with the requirement to Section 6 (1) (g) of the Security of Employment Act which emphasis consultation interparties before retrenchment. There were no criteria in the Voluntary Agreement for retrenchment.

On the third issue of whether the retrenchment exercise was accompanied or coated with threats, the Learned Deputy Chairman

[6] TUICO is a trade union namely Tanzania Union of Industrial Workers

answered the issue in the negative, that there were threats whatsoever on the retrenchment exercise because every employee who was retrenched received his letter of retrenchment accompanied with retrenchment package peacefully.

The fourth issue on whether or not the employer used "*vishawishi*" in order to convince the respondents employees to volunteer for retrenchment the Industrial Court held that, there was "*vishawishi*" put by the employer to convince the employees to volunteer for retrenchment. The Industrial Court award at page 16 reads that:-

> *...Ushawishi ulikuwepo kama ulivyotolewa ushahidi na mlalamikiwa kuwa wafanyakazi walielezwa "atakayejaza fomu ya kupunguzwa atapata mafao mazuri". Huu ni ushawishi uliokuwa ukifanywa na menejimenti... ushahidi wa DW2 alidai kwamba mfanyakazi aliyetaka kujua mafao yake angeliweza kuonyeshwa atakavyolipwa. Huo kwa njia moja au nyingine ni ushawishi...*[7]

The Learned Deputy Chairman concluded that there was no consultation done either in Morogoro because though DW3 from TUICO told the Industrial Court that there was consultation held in Morogoro, but the TUICO Secretary of Morogoro denied[8].

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[7] Industrial Court of Tanzania ruling and award in Trade Inquiry Uchunguzi wa Mgogoro Na. 81 of 2006 Donatus Chawe Sanga and 43 Others – complainants V. TANESCO Respondents per William Naibu Mwenyekiti at p. 16

[8] *ibid* at p. 17

The Learned Deputy Chairman at the end of the day reversed and set aside the employer's exercise of retrenchment and ordered that the employees retrenched must be reinstated back to work or employment not physically but monetary thence she ordered the employer TANESCO to pay the retrenched employees eighteen months salaries for loss of their employment:-

> *...Kwa hitimisho natengua uamuzi wa mlalamikiwa kuwapunguza kazi wafanyakazi wake katika zoezi la 2003 na kuamuru awarejeshe kazini kimaslahi kwa kuwalipa mishahara ya miezi 18 kwa kukosa ajira...*[9]

For the employees who were TUICO officials at place of work and whose termination or retrenchment the employer had first to seek "*a green light*" from the Labour Officer, the Learned Deputy Chairman ordered the employer to reinstate them "*physically*[10]" because the employer never obtained a go ahead *kibali* from the Labour Commissioner as the law required i.e. Security of Employment Act[11].

The Industrial Court stated on the non-availability of the permission to retrench TUICO Official at place of work from the Labour Officer thus; (i.e. prior approval by the Labour Office):-

> *...Kwa waliokuwa wajumbe wa matawi ya TUICO waliopunguzwa kazi bila kibali cha Afisa wa Kazi. Nimeamua hapo juu sharia lazima ifuatwe... Hivyo namwamuru mlalamikaji awarejeshe kazini "physically"*

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[9] *ibid* at p. 20
[10] *ibid* physical reinstatement in lieu of being compensated for the loss of a job
[11] S. 8 (b) of the Security of Employment Act

wajumbe wote waliopunguzwa bila kibal na kulipa mishahara yao yote na marupurupu waliyokuwa wakipata tola tarehe ya kupunguzwa kazi... hadl tarehe 31 Julai, 2006 ...Baada ya hapo mlalamikiwa aombee kibali kwa Afisa wa Kazi ....akisha kupata nao walipwe hiyo mishahara ya miezi 18 kama wenzao...[12]

For TUICO Officials therefore, the Court ordered that, first the employer has to reinstate them and then seek for a permission from the Labour Officer and after getting the permission he could now retrench the TUICO Officials at place of work and pay them 18 months salaries like other retrenchees[13].

The applicant in Revision No. 78A of 2008 Tanzania Electric Supply Company Ltd.,[14] (TANESCO) was not satisfied with the ruling and award of the Industrial Court and preferred the present revision as against the Respondents Donatus Chawe Sanga and Others. Equally the applicants in Revision No. 78B of 2008 Donatus Chawe Sanga and others[15] were unhappy with the Industrial Court ruling and award. Thence applied before this Court for revision and as we have said above the two revisions have been consolidated. The parties argued their respective revision by way of written submissions.

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[12] *op. cit* note 7
[13] Industrial Court award op. cit at p. 21 see also S. 8(b) of the Security of Employment Act
[14] TANESCO V. Donatus Chawe Sanga and 443 Others Rev. No. 78 A of 2008
[15] Donatus Chawe and 443 Others V. TANESCO Rev. No. 78B of 2008

Counsel for the applicant in Revision No. 78A of 2008[16], Mr. Kisusi represented the applicant and Mr. Mtogesewa, Advocate represented the respondents in Revision no. 78A of 2008. While in Revision 78B of 2008[17] (the) Learned Counsel Mr. Mtogesewa appeared for the applicants and Mr. Kisusi Learned Counsel appeared for the respondent respectively.

The applicant in Revision No. 78A TANESCO and employer of the Respondents submitted four grounds of revision like this:-

(a) *That the Learned Deputy Chairman erred in holding that the respondents (employees) were retrenched without their will (hawakupunguzwa kwa ridhaa yao wenyewe)*[18].

(b) *That the Learned Deputy Chairman erred in law and fact for holding that procedure was not followed in retrenching the respondents including the trade union officials*[19].

(c) *The Learned Deputy Chairman erred for setting aside the decision of the applicant employer to retrench the respondents employees and ordered them to be reinstated in monetary form (kuwarejesha kimaslahi) for paying then 18 months salaries...*[20]

(d) *That the Learned Deputy Chairman erred in holding that the trade union officials at place of work should be physically reinstated and be paid 18 months remuneration like other*

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[16] *op. cit* note 12
[17] op. cit note 13
[18] Applicant's written submission in Revision No. 78A of 2008 item 2:1 at p. 5 of 10
[19] *ibid* item 2:2 at p. 6 of 10
[20] *ibid* item 2:4 at p. 8 of 10

employees and after being reinstated the employer must first seek leave of the labour officer to retrench them[21].

The grounds for revision preferred by the applicants in Revision No. 78B of 2008 Donatus Chawe Sanga and 443 Others through their advocate Mr. Mtogesewa are as hereunder ***id-est***:-

(a) ***Ground 1 and 2 of revision***:

The applicants having proved all trade inquiry and trial issues in their favor and in results thereof the first instance Court (henceforth the Court) having further specifically vacated the respondent's decision to retrench the complainants applicants the Court erred in law and in fact in not ultimately ordering their reinstatement contrary to the law...[22]

(b) ***Ground 3 of revision***:

The Learned Trial Deputy Chairman of the first instance Court erred in law and in fact in a making (sic) the above compensation decision in lieu of and not granting reinstatement on account of alleged existence of IPTL and RICHMOND...[23]

In his submission in chief by written submission in support of the first ground [No. (a)]. In Revision No. 78A of 2008[24]. Mr. Kisusi, Learned Counsel for Applicants argued that the affidavit of Mr. Rajabu Mustafa

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[21] *ibid* item 2:6 at p. 9 of 10

[22] Applicants written submission in Revision No. 78B of 2008 item 13 at p. 4 of 14 in support of the grounds of revision of an award of 18/07/2008 in Trade Enquiry No. 81 of 2006

[23] *ibid* item 54 at p. 12 of 14

[24] *op. cit* note 12

Mbiro and his evidence during cross examination (madodoso) revealed without shadow of doubt that the respondents employees were retrenched at their own will "*kwa ridhaa yao wenyewe*"[25].

That the respondents were given one month to consult their own families on the intended retrenchment and at their own will the employees respondents filled the respective forms asking to be retrenched. There was evidence also that every employee respondent who applied to be retrenched by filing the forms for retrenchment copied the same to TUICO Trade Union at place of work branch and hence there was willing amongst the employee respondent to be retrenched[26].

The Act of the employer applicant to pronounce a good retrenchment package for employees who would volunteer to be retrenched was an act of heroness and the employer could have been congratulated on that but the Learned Deputy Chairman negatively took the pronouncement for good or better retrenchment package for volunteers as "*kishawishi*" which was taken by the Court as a wrong move[27] and hence the Court erred in setting aside the decision to retrench[28].

In reply by written submission in "*majibu ya wajibu marejeo ya hoja za maandishi za Muomba Marejeo Na. 78A*". Mr. Mtogesewa Learned Counsel argued on the above ground of revision that the Learned Deputy

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[25] *op. cit* note 16 at p. 5 of 10 item 2:1:1

[26] *ibid* item 2:1:2 and 2:1:2 at p. 6 of 10

[27] *ibid* item 2:1:5 the Industrial Court set aside the decision of the employer to retrench because among others there was the so called "*kishawishi*" the better retrenchment package

[28] Industrial Court award *op. cit* note 7 at p. 20 paragraph 2

Chairman was satisfied upon her inquiry unto the trade dispute that the respondents were retrenched without their willingness. There were threats which was accompanied by the retrenchment. Donatus Chawe Sanga (PW1) Veneranda Akonaay (PW2) and Daudi Mwakatage (PW3) both showed in their affidavits that there were threats and therefore the retrenchment exercise was not at the willingness of the employees respondents. That there were no consensus or *"makubaliano"* in retrenchment exercise.

Mr. Mtogesewa further submitted that since there was no consensus *"makubaliano the applicant employer never carried out"* consultations or *majadiliano* at place of work contrary to section 6 (1) (g) of the Security of Employment Act[29]. The applicant employer also acted contrary to Section 58 (2) of the Employment Ordinance[30], which requires the employer to submit the matter pertaining to retrenchment of the trade union officials which the labour officer has to approve. The Learned Counsel quoted a decision of the Court of Appeal of Tanzania which stated the effect of not complying with the provision of Section 6 (1) (g) of the Security of Employment Act. He cited the case of **George Barabara and 240 others V. Minister for Labour and Youth Development and 2 others**[31]:-

> *...The decision of the board was obviously illegal for contravening the provision of Section 6 (1) (g) requiring the management to consult with the field branch of*

[29] Cap 387 of the Laws of Tanzania
[30] Cap 366 of the Laws of Tanzania
[31] [2002] TLR 234

OTTU before the decision whether or not to reduce the workforce was taken. If the decision of the board ran faul of Section 6 (1) (g) this means that in law the purported decision of the board was not decision at all. It was a nullity. It amounted to saying that in law no decision had been taken to reduce the workforce...

In answering the first ground of revision in Revision No. 78A of 2008 we think it is better also to combine ground two of the revision which is (B) that whether or not procedure was followed in retrenching the respondents including the trade union TUICO officials at place of work.

In the submission of the applicant counsel Mr. Kisusi the Industrial Court decided that Section 6 (1) (g) of the Security of Employment Act as well as Section 8 (a) of the same Act were not followed. However he controverted that the Industrial Court was wrong because the employees respondents had themselves volunteered to be retrenched and that item 5:2 of the voluntary agreement gave mandate to the representative of TUICO to consult on behalf of all TUICO branches in the country.

In reply on the procedural fairness i.e. whether or not the employer followed the procedure in retrenching the respondents employees, Mr. Mtogesewa submitted that, the voluntary agreement does not sail above the law of this country even Section 6 (1) (g) of the Security of Employment Act which requires consultation to be held at place of work

before retrenching is not forfeited by the voluntary agreement entered interparties:-

> *...Mkataba wa hiari hautengui sheria zozote za Jamhuri ya Muungano...yaani katu hautengui Kif. 6 (1) (g) cha Sheria ya Usalama Kazini inayotaka majadiliano kufanyika mahala pa kazi juu ya haja, taratibu za upunguzaji kazi na hata namna utekelezaji wa mkataba wowote wa hiari juu ya upunguzwaji wafanyakazi...*

On the non-compliance of Section 8 (b) of the Security of Employment Act on termination of employment to trade union officials at place of work, the learned counsel submitted that the issue of trade union officials at place of work to be retrenched without the approval of the Labour Officer as the law says S. 8 (b) of Security of Employment Act is one of the issues that procedure to retrench the employees including the trade union officials was not followed by the employer applicant.

In disposing the first ground of Revision No. 78A we entirely and respectfully agree with the learned counsel for the applicant Mr. Kisusi that the Learned Deputy Chairman erred for holding that the respondents employee were retrenched without their will.

The fact that the applicant's company was under **structural change** and the need to retrench some employees was contemplated and inevitable it goes without a flicker of doubt that the employees willingness to be retrenched or not to be retrenched cannot be a ground to fault the decision of the employer to retrench.

The act of the employer applicant to pronounce a better retrenchment package to the employees was meant to get a number of employees who would volunteer to be retrenched. We agree that it was an act of heroness and care of the employees for the purpose of getting away with good retrenchment package. The act of employees to fill the retrenchment forms was by and large reflected by a good retrenchment package pronounced by the employer applicant as rightly pointed out by Mr. Kisusi, Learned Counsel for the applicant employer.

The question of being unwilling to be retrenched where there is a **structural change**, technological change or because of the economic needs of an enterprise or company does not hold water if the reasons to retrench are valid and the fair procedure to retrench was followed by the employer. It is not disputed that there was structural change undergoing within the applicant's enterprise or company which forced the applicant to retrench some employees.

The company of the applicant as rightly found by the Learned Deputy Chairman was restructured whereby three departments were created namely, Distribution *(Usambazaji),* Generation *(Uzalishaji)* and Transmission *(Usafirishaji)* this meant that the retrenchment of the employees was the result of operational requirements of the applicant's employer's enterprises or company; we may point here that:-

> *...Structural needs of the enterprise or company refers to a reason for termination or retrenchment of*

employees after some posts becoming redundant following a restructuring of the enterprises...

It can be depicted from the above definition of restructuring of an enterprises that, unwillingness to be retrenched or vice versa has no effect and the employer may proceed with the retrenchment exercise based on operational requirements under structural needs and the Courts should not lightly interfere with the employers genuine reason or exercise to retrench. In order to cement our point we are constrained to borrow a persuasive decision of the Labour Court of South Africa in **Hendry V. Adcock Ingram**[32] that:-

...If the employer can show that a good profit is to be made in accordance with a sound economic rationale and it follows a fair process to retrench an employee as a result thereof, it is entitled to retrench. When judging and evaluating an employer's decision to retrench an employee, ***the Court must be cautious not to interfere to the legitimate business decision taken by employers who are entitled to make a profit and who in doing so are entitled to restructure their business***[33]*...*

We hold that the **first** ground of revision by the applicant employer in Revision No. 78A is merited and with respect the Learned Deputy

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[32] [1998] 19 ILJ 85 (LC) as quoted from Dr. Emil Strydom LLB (Pret) LLM, LLD (UNISA) article titled "dismissal for operational reasons"

[33] Hendry V. Adcock ibid see also essential labour law Vol. 1 (2002) Labour Law Publishers Houghton South Africa 3rd edition p. 236

Chairman erred in holding that the respondents employees were retrenched without their will. Also on the above discussion we find that, and equally agree with the counsel for the applicant employer in revision 78A, that the Learned Deputy Chairman was wrong for setting aside the decision of the employer applicant to retrench **this disposes the first part of ground three of the applicant's employer's** ground for revision in Revision No. 78A.

We find also that after the decision of the Learned Deputy Chairman to set aside the decision of the applicant employer to retrench the employees she could not have ordered for the reinstatement of the employees because the operational requirement on structural needs of the applicant employer had made their posts redundant following the restructuring of the enterprises or company of the applicant. The discussion supra has touched and disposed also ground 1 and 2 of revision by the applicant employees in Revision No. 78B which states that:-

> *...Ground 1 and 2 of revision. The applicants having proved all trade inquiry and trial issues in their favour and in results thereof the first instance Court... having further specifically vacated the respondent's decision to retrench the complainants applicants, the Court erred in law and in fact in not ultimately ordering their reinstatement contrary to the law...*

We stress that the Learned Deputy Chairman could not have ordered for the reinstatement of the employees back to their work because of the exercise of the applicant to restructure his enterprise had made many

posts being redundant due to the operational requirements of the employer applicant which was legitimate.

We therefore dismiss also ground 1 and 2 of the applicant employees in Revision 78B and dismiss **the third ground** of the applicant employer in Revision 78A last part which challenged the reinstatement of the employees in monetary form. The decision of the Learned Deputy Chairman in ground three of Revision 78A was not correct in setting aside the decision of the employer to retrench, but the Learned Chairman was correct to pay them (reinstatement) on monetary form. We will at the end say whether or not the Deputy Chairman was correct to order for 18 months' salary in lieu of physical reinstatement.

We now come to the second ground of revision by the applicant employer in Revision No. 78A[34] which is couched like this:-

> *...That the Learned Deputy Chairman erred in law and fact for holding that procedure was not followed in retrenching the respondents including the trade union officials*[35]*...*

At page 6 of 10 the applicant employer through his advocate Mr. Kisusi Learned Counsel submitted that the first instance Court i.e. the Industrial Court ruled that the provision of Section 6 (1) (g)[36] and 8 (b)[37] of the Security of Employment Act was not followed. The Industrial Court

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[34] *op. cit* note 12

[35] Item 2:2 of the applicant employer submission in Revision no. 78A *ibid* at page 6 of 10 of the typed written submission

[36] Security of Employment Act Cap 387 s. 6 (1) (g) (SEA)

[37] *ibid* S. 8 (b) (SEA)

found also that item 5:1 of the voluntary agreement spelt out that there was a committee for the purpose of consultations **inter-parties** i.e. between the employer and employees or their trade union. However the Learned Deputy Chairman in his decision found that there was no evidence which showed that consultation was done i.e. there was no consultations. On the trade union officials at place of work, the Industrial Court held that:-

> *...Katika mahitimisho ya mlalamikaji alieleza wazi kwamba Wajumbe 20 wa Chama cha Wafanyakazi walipunguzwa bila kuomba kibali cha Afisa wa Kazi chini ya K. 8 (b) cha Sheria ya Usalama Kazini kinachotaka mwajiri pale anapotaka kupunguza kazi Mjumbe, kuomba kibali cha Afisa wa Kazi. Upande wa mlalamikiwa umedai kwamba kibali hakikuhitajika kwa vile walaiamikaji waliomba wenyewe. Ndiyo maana nasema na kutamka bayana kwamba taratibu hazikufuatwa*[38]*...*

Mr. Kisusi challenged the above decision of the ***court a quo***[39] that it erred for holding that consultations was not done and hence contravening S. 6 (1) (g) of the Security of Employment[40]. That there was in the voluntary agreement "*kipengere*" item 5:2 which mandated the TUICO[41]

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[38] *op. cit* note 16 item 2:2:2 at p. 7 of 10
(See also the ruling of the Industrial Court of Tanzania per William, Deputy Chairman in Uchunguzi wa Mgogoro wa Kikazi No. 81 of 2006 between Donatus Chawe and others V. TANESCO at p. 13, 14

[39] Court a quo refers to the Court of first instance

[40] *op. cit* note 34

[41] TUICO Trade Union Tanzania Union of Industrial and Commercial Workers

representative powers to make consultations and any decision on behalf of all TUICO branches in the country, he submitted.

On contravening Section 8 (b) of the Security of Employment Act, the Learned Counsel for the applicant employer argued that, the issue of the applicant employer contravening the said provision 8 (b) of the Employment Act[42] was not among the claims of the complainants in the "*kumbukumbu za madai*" i.e. statement of complaint

Now, on the alleged contravention of Section 6 (1) (g) of the Security of Employment Act[43], by the applicant employer, we are of the view that the consultations envisaged under Section 6 (1) (g) of the Security of Employment Act relate to collective bargaining, and is essentially tripartite. This is why under Section 5 (1) of the Security of Employment Act[44], the establishment of workers' committee requires the existence of ten or more employees who are union members. In other words, the employer the employees and the relevant trade union must be involved in the consultations (see also the High Court full bench decision in **AGA KHAN HOSPITAL V. BAKARI RAMADHAN AND 106 OTHERS)[45].**

Section 6 (1) (g) of the Security of Employment Act, Cap 387 provides the necessity of consultation like this:-

> *...The functions of the committee shall be to consult with the employer concerning any impending*

[42] *op. cit* note 34
[43] *ibid*
[44] *ibid* S. 5 (1) of SEA requires the establishment of workers' committee
[45] Miscellaneous Civil Appeal No. 11 of 2005 arising from consolidated Revisions No. 4A and 4B of 2005 of the Industrial Court of Tanzania at Dar es Salaam from Trade Dispute Inquiry No. 144 of 2002

redundancies and the application of any joint venture agreement on redundancies[46]...

The above is a mandatory requirement which the employer and the employees trade union requires them to make consultations.

We entirely and respectfully agree with the Learned Deputy Chairman that there was no consultations made interparties prior to the termination of the employees on retrenchment or where there was any impending redundancy as envisaged under S. 6 (1) (g) of the Security of Employment Act. There was no record to show that such committees sat with the employer for consultations. Perhaps we are constrained to give here the definition of consultation, what exactly consultation means; in a persuasive case of **National Union of Metal Workers of S.A. V. Antlantic Diesel Engines**[47] the Labour Appeal Court of South Africa held ***interalia*** that; consultation:-

> *...It simply means that an employer, who senses that it might have to retrench employees in order to meet operational objectives, must consult with the employees likely to be affected (or their representatives) at the earliest opportunity in order to advise them of the possibility of retrenchment and the reasons for it*[48]...

With regard to the contravention of Section 8 (b) of the Security of Employment Act, it is our considered opinion that, although the applicant's

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[46] *op. cit* note 34

[47] [1993] 14 ILJ 642 (LAC) Labour Appeal Court of the Republic of South Africa

[48] *ibid* (See also NUMET V. North Mara Gold Mine Ltd. Revision No. 6 of 2015 Labour Court at p. 27

employer's counsel argued that the issue of the employer contravening Section 8 (b) of the Security of Employment Act was not in the statement of complaint of the employees or "*kumbukumbu za madai*" we think that the applicant employer was required to adhere to the said provision which requires him to have a prior permission from the Labour Officer to retrench or terminate the trade union officials save only in case of misconduct on part of the trade union officials. In **Aga Khan Hospital case** (supra), the Court of Appeal dealing with the above question held that:-

> *...Section 8 (b) of the Old Security of Employment Act, which appears as Section 9 (b) of the Security of Employment Act, Chapter 387 R.E 2002, prohibits the termination of employment of a member of the workers' committee except where such member has breached the disciplinary code. If an employer wishes to terminate such a member from employment in the absence of a breach, he must seek prior approval if the Labour Officer. In our opinion redundancy is cessation of employment which falls within the ambit of Section 9 (b) of the Security of Employment Act, Chapter 387 R.E. 2002 ...(**IN AGA KHAN HOSPITAL V. BAKARI RAMADHAN AND 106 OTHERS** per Mandia, J.A.*[49] *unreported).*

We once again stress here that procedure was not followed to retrench the Trade Union committees officials as the employer applicant

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[49] *op. cit* note 45
Coram Manento, J.K., Kalegeya, J. and Mandia, J. High Court of Tanzania at Dar es Salaam (unreported)

did not seek any prior permission form the labour officer as envisaged under the law. Furthermore the requirement of consultations under S. 6 (1) (g) of the Security of Employment Act was not followed, we entirely and respectfully agree with the Learned Deputy Chairman of the Industrial Court of Tanzania and dismiss the second ground of revision by applicant employer in Revision 78A.

We conclude by disposing the third ground of revision of the applicants employees in Revision No. 78B which is styled thus:-

> *...The Learned trial Deputy Chairman of the first instance Court erred in law and in fact in a making (sic) the above compensation decision in lieu of and not granting reinstatement on account of alleged existence of IPTL and RICHMOND...*

The Learned Deputy Chairman in our view as earlier stated could not order reinstatement of the applicants employees in Revision 78B lest (for fear that) the employees could have remained without any work to do because their vacancy or positions were declared redundant by the employer respondent. Ordering for reinstatement could have caused inconvenience for the parties and the award could be inexcutable i.e. (an award that could not be executed). We hold therefore the view that the Learned Deputy Chairman was correct not to order reinstatement but pay compensation in lieu thereof.

As to the compensation of eighteen months salary ordered by the Learned Deputy Chairman to be paid to the applicants employees Donatus

Chawe Sanga and 443 others for each of the employee, we think by and large that the amount of eighteen months remuneration for each of the employee is exorbitant in the circumstances regard being had to the fact that there was valid reason (s) to retrench except that the employer respondent in Revision 78B flawed the procedure before retrenching the employees applicants. Third ground in Revision 78B is dismissed.

Summary of the verdict (decision):-

(i) *Revision No. 78A* ***TANESCO V. Donatus Chawe and 443 others****. Ground one (1) of the revision is merited to the extent that the Learned Deputy Chairman erred in holding that the respondents employees were retrenched without their will.*

(ii) *Ground two (2) in Revision 78A that the Deputy Chairman erred in law and fact for holding that procedure was not followed in retrenching the respondents employees is dismissed as it is unmeritorious. The Deputy Chairman was correct to hold that procedure was not followed in retrenching the respondents employees.*

(iii) *Ground three (3) in Revision 78A that the Deputy Chairman erred for setting aside the decision of the applicant employer to retrench the respondents employees and ordered them to be reinstated in monetary form for payment of 18 months' salary (ies) each (kuwarejesha kimaslahi) is only merited to the extent that the Learned Deputy Chairman erred for setting aside the decision of the applicant employer to retrench the respondents*

employees. The payment of 18 months' salary was an excessive and exorbitant amount of compensation for procedural unfairness (i.e. employer did not follow the procedure before retrenching the employees).

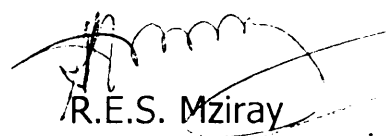
(iv) *The fourth ground (4) of revision in Revision 78A that the Learned Deputy Chairman erred in holding that the trade union officials at place of work should be physically reinstated and be paid 18 months' salary remuneration like other employees, that the employer must first seek leave of the labour officer to retrench them, is dismissed, the Learned Deputy Chairman was right to hold that procedure was not followed to retrench the trade unions committee official (member) as the employer did not seek a prior permission from the labour officer as per section 8 (b) of the Old Security of Employment Act which appears as section 9 (b) of the Security of Employment Act Cap 387 R.E. 2002.*

Nevertheless we found that the **trade unions officials** cannot be reinstated physically now because of the long duration they have been out of work and their jobs are probably with other employees. We may grant them compensation of four (4) months' salary in lieu of being reinstated physically. We quash the order to reinstate them and pay 18 months' salary (i.e. the trade unions committee members officials). For the rest of the employees, we think the compensation of three (3) months' salary is just and equitable to all parties in the case.

(v) *Revision No. 78B* ***Donatus Chawe and 443 others V. TANESCO****. Ground No. 1 and 2. That the applicants having proved all trade inquiry and trial issues in their favour and in results thereof the first instance Court having further specifically vacated the respondent's decision to retrench the complainants applicants the Court erred in law and in fact in not ultimately ordering their reinstatement contrary to the law are dismissed for lack of merit, the employer had valid reasons to retrench the applicants employees.*

(vi) *Ground No. (3) three in Revision 78B that the Learned Trial Deputy Chairman of the first instance Court erred in law and in fact in making the above compensation decision in lieu of and not granting reinstatement on account of alleged existence of IPTL and RICHMOND is dismissed. The Deputy Chairman was correct not to reinstate the employees who were retrenched by valid reasons of the employer.*

In the event of the foregoing we partly allow Revision No. 78A TANESCO V. Donatus Chawe and 443 others to the extent explained in the judgment supra and we dismiss the Revision No. 78B between Donatus Chawe and 443 others V. TANESCO.



R.E.S. Mziray

JUDGE

09/02/2016

I.S. Mipawa
JUDGE
09/02/2016

L.L. Mashaka
JUDGE
09/02/2016

Court: Judgment is read today in the presence of Mr. Kisusi, Advocate for Applicant in Revision No. 78A and Mr. Mtogesewa for the Respondents. In Revision No. 78B Mr. Mtogesewa, Advocate for the Applicant and Mr. Kisusi, Advocate for Respondents are both present.

I.S. Mipawa
JUDGE
11/02/2016