IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 121 OF 2017

MATILDA GERASE RWEBUGISA.....APPLICANT

VERSUS

BLUE ROCK SPUR LTD.....RESPONDENT

JUDGEMENT

Date of Last Order: 06/04/2018

Date of Judgement: 08/05/2018

L.L.Mashaka, J

This judgment is in respect of application for revision filed by the applicant Matilda Gerase Rwebugisa by Notice of Application and Chamber Summons under Section 91(1)(a) and (b),(2)(b) and (c) and Section 94(1)(b)(i) of the Employment and Labour Relations Act 2004 as amended; Rule 24(1), (2)(a)(b)(c)(d)(e)(f),(3)(a)(b)(c)(d),(11)(c) and Rule 28(1)(c), (d) and (e) of the Labour Court Rules,2007 and supporting affidavit of the applicant.

The hearing of the application was by away of written submissions and from records, Ms. Stella Simkoko, Advocate from Peace Attorneys represented the applicant and Mr William Kagoroba, represented the respondent. I highly appreciate the timely filing of the written submissions by both parties according to the schedule order by the Court.

The applicant's main ground for revision is refuting the order of Hon. Arbitrator of reengagement instead of ordering reinstatement without loss

of earnings or compensation of 12 months salaries for hardships the respondent had subjected him to and the shock of terminating her immediately after her annual leave. That can be seen from pages 4 to 5 of her written submission and supporting affidavit, while at pages 1 to 3 is the production of the facts pertaining to the historical nature of the dispute and what transpired at the CMA.

It was argued that as per evidence tendered at the CMA by DW1, DW2 and DW3, Hon. Arbitrator erred in making order of reengagement as he had already made some findings that the applicant had already been transferred to Food Lovers since 1st December 2015, that the applicant had agreed to work at Food Lovers and had worked for three months after being transferred there due to decline in business. That the applicant was on probation at Food Lovers and applied for annual leave and the relationship between the parties had ended. That Hon. Arbitrator was duty bound to order the applicant to continue working at Food Lovers and not to order re-engagement.

The applicant insisted that due to that she would not go back to work to the respondent. That from the evidence it can be portrayed there will be no peace and harmony between the applicant and her immediate boss (DW1) who had betrayed her by testifying that he did not send her to train other staffs at Food Lovers and that he had transferred her to Food Lovers while the applicant argues that she was not transferred. That since retrenchment was unfair and the order of reengagement unfair it would be fair if the applicant be compensated more than twelve months salary and other terminal benefits and damages as the applicant has been subject to unnecessary torture by unfair retrenchment, unprocedural one.

In response the respondent argued that the respondent had faced economic constraints which caused her to restructure her company and the applicant was transferred to Sister Company on 1st December 2015 in the style Food Lovers Ltd whereas at the time of termination she was no longer the employee of the respondent. And to prove that the applicant had never raised any issue of disagreeing with the transfer where she was provide with annual leave but filed a dispute against Rock Spurs being a wrong party and that after the annual leave she never reported.

The contention that the relationship between the parties is brilliant and there was no any evidence that the applicant was mistreated by the respondent thus the CMA award was based on evidence and law findings as per Rule 32 (1)(d) of GN 67 of 2007 which requires Hon. Arbitrator to order reinstatement or re-engagement where the termination is unfair because of employer failure to follow a fair procedure.

That the award was issued in favour of the applicant to be re-engaged.

It is noted from the records that no rejoinder was filed by the applicant thereto.

The key issue for determination which arise from this application is whether or not Hon. Arbitrator order for reengagement was proper or not. Despite the fact that part of the applicant's submission concentrates on the issue that termination was unfair both substantively and procedurally, the same is not the disputable issue between the parties rather it is the reliefs entitled to parties.

The law under Section 40 (1) (a)(b)(c) of the Employment and Labour Relations Act No 6/2004 clothes the Arbitrator or this Court after making a finding of unfair termination; provides that:-

...S. 40 (1) If an arbitrator or Labour Court finds a termination is unfair the arbitrator or Court may order the employer:-

(a) To reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or

(b) To re-engage the employee on any terms that the Arbitrator or Court may decide; or

(c) To pay compensation to the employee of not less than twelve months' remuneration.

Hon. Arbitrator made a finding on the reliefs entitled to the applicant that "*Baada ya Tume kupitia ushahidi wa pande zote mbili imeonekana kuwa kwamba hoia ya tatu ya stahiki, Tume baada ya kupitia ushahidi wa pande zote mbili imeona wazi kuwa, mlalamikaji hakuweza kuthibitisha endapo hakupokea barua ya uhamisho ilhali akikubali ushahidi wa DW2 kuwa alikabidhiwa barua zote ikiwemo ya uhamisho jambo ambalo ni mkanganyiko kwani ni wazi kuwa alikubali uhamisho. Tume pia imeona ya kuwa mlalamikiwa amesababisha mkanganyiko katika ajira ya mlalamikaji kwa kushindwa kumpa stahiki zake zote wakati alipopewa barua ya uhamisho na hatimaye kuja kumlipa stahiki zake hapo baadaye wakati wa*

kupewa barua ya kupunguzwa kazi ambayo hakuwa na mamlaka ya kufanya hivyo kwani mahusiano yalishaisha.

Kwa mantiki hiyo nikirejea Kanuni ya 32(5)(b) ya GN 67/2007 na mamlaka niliyopewa na Tume kwa mazingira ya mgogoro huu naamuru mlalamikiwa kumpokea mlalamikaji kazi (re-engage) kwa kuwa amesababisha mkanganyiko katika ajira ya mlalamikaji na pia mlalamikaji mwenyewe alishindwa kuthibitisha sababu iliyopelekea ashindwe kurejea ofisi aliyohamishiwa jambo ambalo pia limepelekea utata katika mgogoro huu wote kiujumla.

It is therefore the holding of this Court Hon. Arbitrator was not correct to order reengagement of the applicant as the appropriate remedy after reaching a finding of unfair termination following the evidence adduced before him. The respondent was facing business decline and restructuring. I therefore quash the remedy to the applicant. Moreover as per CMA Form No. 1 the applicant employee prayed to be paid compensation of 12 months salary and any other employment benefits.

In the case of **Michael Kirobe Mwita Vs AAA Drilling Menager**, Revision No 194 of 2013,[2014]LCCD1 at page 162, Hon. Mipawa,J, (as he then was); where the Court was confronted with the revision application on discontentment of the relief granted at the CMA and the Court referred the provisions of Section 40 (1)(a),(b)(c) of the Employment and Labour Relations Act No. 6/2004 and held *inter alia* that; *"....Re engagement means that a new relationship had begun the relationship of the employment may be different from the old one. The employee may also be given the old job but without the rights he used to enjoy in the old job...."* The Court emphasised that, Hon. Arbitrator may make appropriate

compensation based on the circumstances of each case and considering the factors given under Rule 32 (5)(a)(b)(c)(d) and (f) of GN 67/2007. [supra at page 222]. However, this Court has to refer and consider the reliefs prayed for by the applicant in CMA Form No.1 which was lodged at the CMA and the business of the respondent.

The finding by Hon. Arbitrator on the termination of employment being substantively fair and procedurally unfair is confirmed. Therefore since termination was procedurally unfair and the applicant was retrenched on business decline, the reliefs granted for re-engagement is hereby quashed and set aside. The applicant is to be compensated three months salaries for procedural unfairness regard being to the decline of employer's business and the decision for compensation is fair and just to both parties. Reference is made to the case of **Sodetra(SPRL)Ltd Vs Njellu Mezza & Another** , Revision No 207 of 2008, HCLD at Dar Es Salaam [unreported] Rweyemamu,J at pages 11-12; a persuasive decision, which I subscribe too.

In the circumstance, the application for revision partly successful as explained above.

It is so ordered.

L.L.Mashaka

JUDGE

08/05/2018