IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 264 OF 2019
BETWEEN
MAINLINE CARRIES LTD..... APPLICANT

VERSUS

DELIFRIDA FILBERT LIBABA & 7 OTHERS..... RESPONDENT

JUDGMENT

Date of Last Order: 04/08/2020
Date of Judgment: 14/08/2020

Z.G.Muruke, J.

MAINLINE CARRIES LTD, the Applicant filed present application seeking revision of the award of the Commission for Mediation and Arbitration (herein CMA) in Labour Dispute No. CMA/DSM/ TEM/577/17/254/17 delivered on 15/02/2019. The application is made under the provisions of Sections 91 (1) (a) (b) & 91 (2) (a) (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 R.E 2019] (herein the Act) and Rules 24 (1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) and 28 (1) (a) (b) (c) (d) (e) of the Labour Court Rules, GN No. 106 of 2007 (the Rules).

The application is supported by the affidavit of the applicant's Principle Officer Moses Manko. On the other hand respondents challenged the application through a counter affidavit affirmed by Delifrida Filbert

Libaba on behalf of the other respondents. Hearing was by way of written submission, the applicant was represented by Advocate Ashery K. Stanley while the respondent was served by Advocate Lucas Nyagawa.

Brief facts leading to the present application are; the respondents were employed by the applicant as security guards on different dates and remuneration as per their employment contracts. On 31st August,2017 the respondents were retrenched from their employment, basing on the operational requirement as the applicant decided to restructure the whole security departments unit .Upon termination the applicants were paid the retrenchment entitlements as agreed in the retrenchment agreement. Dissatisfied retrenchment the respondents referred the dispute to CMA where decision was on their favour. Being resentful with the CMA, award, the applicant filed the present application.

Submitting in support of the application, the applicant counsel apart from dopting affidavit in support of the application, he submitted that the arbitrator erred in law and fact in deciding that the applicant had no valid reason for retrenchment. The respondents were terminated on operational requirement as the applicant decided to change their security system by engaging a security company referring Section 23 (2) (c) of Cap 366 RE 2019. Therefore, he had to overhaul the entire security department and that affected the respondent's employment. The applicant through DW1 proved the validity of a reason producing a contract between the applicant and KK security Company Exhibit MC 3.

It was stated that the retrenchment process was preceded by consultation meeting between applicant and COTWU, a trade union representing respondent at work place, and the consultation resulted to the signing of the retrenchment agreement, as evidenced by MC5 attendance register and MC6 minutes of the meeting, and the Retrenchment agreement MC 8. Having signed the agreement respondents were barred to file the case challenging the fairness of the retrenchment both substantively and procedurally, referring Section 38(2) of Cap 366 RE 2019 and Rule 23 (8) of Employment and Labour Relationship (Code of Good Practice) Rules GN 42/2007 and the case of **Metal Product Limited Vs. Mohamed Mwerangi & 7 others,** Rev.148/2008.

The applicant's counsel further stated that, the applicants were not terminated on ground of poor performance hence the arbitrator erred in holding the there is no proof for performance of the respondent. That the arbitrator misdirected herself on basing on the provision of Rule 18 (1) on GN 42, since the position is applicable in circumstances of this case because it only applicable in managing the performance of the employee at work place. It was further submitted that the applicant are aware of the retrenchment procedure of requiring the discussion of measures to be taken to avoid or minimize the intended retrenchment. The same is not applicable in this case as the applicant is a transportation company and the respondents were security guards, there is no proof that they have other skills to fit in the other positions. He thus prayed for revision and set aside the CMA's award.

Responding to the applicant's submission Lukas Nyangawa for the respondent counsel submitted that the arbitrator was right in deciding that the applicant had no valid reason of termination. The respondent's retrenchment was an afterthought after the applicant failed to establish the allegations of theft against the respondents. That suspension was on the same date as the date the applicant signed the contract with KK Security, in terms of exhibits MC3 AND MC2, referring the case of **Samora Boniphace & 2 others v Omega Fish Ltd**, Rev. 56/2012.

It was further argued that the existence of the retrenchment agreement does not ouster the CMA's jurisdiction. CMA has mandate to examine the reason of termination based in operational requirement to ascertain whether has been used as pretext in regardless whether there is agreement or not. The labour laws provides room for any party who feels that her termination was unfairly terminated to file dispute at CMA for unfair termimation, therefore the respondent were right to file the same before CMA.

It was further stated that it was s duty of the employer to train and provide respondents with best working tools for security, to enable them to reach required standards before retrenching them, hence the arbitrator was correct to rule out that the applicant was supposed to train the respondents to elevate their performance before opting for retrenchment.

The respondent counsel further argued that the applicant being the transportation company does not necessary means that all the duties required specialized skills, others need only directions and short training. If

they managed to hire them for security duties without skills for 7 years, it could be possible to transfer them to other departments. He thus prayed for dismissal of the application.

After careful consideration of the parties' submission, records and relevant laws, issue for determination are, (i) whether the termination of employment on retrenchment was based on a valid reason and stipulated procedures and (ii) to what reliefs are the parties entitled. It is an established principle that, termination of employment or retrenchment must be based on a valid reason or reasons and stipulated procedures, for instance the consultation and notification procedures of the workers or percentage of the total workforce. For a retrenchment exercise to be substantively and procedurally fair, the employer is required to adhere to the provisions of Section 38 of Cap 366 RE 2019 as read together with Rule 23 of GN 42.

Section 38 provides that:-

"Section 38 (1) In any **termination for operational requirements (retrenchment)**, the **employer shall comply with the following principles,** that is to say, be 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) shall 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 with members in the workplace not represented by a recognized trade union;

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

[Emphasis is mine].

Again Rule 23 of the ELRA (Code of Good Practice) GN 42/2007 provides that:-

"Rule 23 (1) **A termination for operational requirements** (commonly **known as retrenchment**) **means a termination of employment arising from the operational requirements of the business.** An operational requirement is defined in the Act as a requirement based on the economic, technological, structural or similar needs of the employer.

(2) As a general rule the circumstances that might legitimately form the basis of a termination are-

(a) **economic needs** that relate to the financial management of the enterprise;

(b) **technological needs** that refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to

the new technology or a consequential restructuring of the workplace;

(c) **Structural needs** that arise from restructuring of the business as a result of a number of business related causes such as the merger of businesses, a change in the nature of the business, more effective ways of working, a transfer of the business or part of the business.

(3) The **Courts shall scrutinize a termination based on operational requirements carefully in order to ensure that the employer has considered all possible alternatives to termination** before the termination is effected.

(4) The **obligations 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.

[Emphasis is mine].

Starting with substantive part, it is from records that the applicant's reason for termination was structural needs that the applicant decided to change their security system by hiring a private security company as a result the respondent's employment was affected. The same was disputed by the respondents on the ground that retrenchment came as an afterthought as they were suspended on allegation of negligently performing their duties and caused theft of the applicant's properties.

I have gone through the records and found that it is apparent that on 10th August, 2017 the responds were suspended as per exhibit MC 2 (suspension letter) and on the same date the applicant engaged KK Security Company as seen under Exhibit MC 8 (the agreement between the employer and the trade union), and according to exhibit MC 9 (termination letter) the respondents were terminated on 31st August, 2017.It was the CMA's finding that the respondent were unfairly terminated for the applicant lacks valid reason of termination.

I have cautiously gone through the letter of termination, I have noted that the respondent were terminated on the reason of operation requirement, following applicant decision to restructure the security system of the Company by engaging a Security Company which was well versed with safety and security matter, and not due to the respondent's negligence. It is from the records that, the whole security department was restructured as all the employees on that department were retrenched and the Security Company was hired. The termination was done in accordance with the agreement between the respondent's representative a trade union namely COTWU and the applicant dated 31st August, 2017.

It is my view that suspension of the respondent is not a bar for the applicant to restructure their Company at any time, once it is for the welfare of the Company. The applicant responds to the needs of the business regardless of whether they are suspended or not. I thus find the

respondent's allegation that the retrenchment was an afterthought with no merits.

In regard to the procedure for retrenchment, it is the position of the law that the employer have to adhere to mandatory procedures for retrenchment as provided under Section 38 of Cap 366 read together with Rule 23 and 24 of GN 42 as cited above. The position in the cited provisions was clarified by George Odhiabo in his book titled **Employment Law Guide for Employers, 2018** at page 339 He stated:

> **"In determining the legality of a redundancy, the court examines the bona fides and integrity of the entire process. Even if it is a fair reason, the dismissal can still turn out to be unfair if the employer fails to act reasonably and follow the steps required to effect fair redundancy."**

From records it is undisputed that there was consultation before retrenchment as it is evidenced through exhibits MC 6 the minutes of the meetings held on 23rd August, 2017 and MC 8 the jointly retrenchment agreement between the applicant and the COTWU which were preceded by a notice dated 21st July ,2017.

What is disputed is the applicant's failure to state the alternative ways used to minimize the retrenchment. It was the arbitrator's finding that the applicant failed in the consultation meeting as per exhibit MC 6, has failed even to shift the respondents to the other departments. Section 38(1) (c) (ii) of Cap 366 RE 2019 as cited above, requires the employer to find measures to avoid or minimize the intended retrenchment.

It is my view that in the circumstance of this case the applicant had no other option other than to retrench the respondents as the restructuring process took over the whole security department. The issue of shifting the respondents to other departments depended on the need of the applicant. There is no proof from the respondents that the other department were vacant and they possess qualification to fit in those other departments. However, I believe that all the procedure for retrenchment should not be adhered in a checklist fashion and the same depends on the circumstances of that case. This position was stated in the case of **Metal Product Limited v Mohamed Mwerangi** and 7 others. Rev. No. 148/2008, in that case it was held that;

> " It is my opinion that the various stages itemized under Section 38 are not meant to be applied in a checklist fashion, but rather provide a guideline to ensure that the consultation is adequate and covers all vital matters. Consultation is conducted with view to reaching an amicable settlement and where there is an impasse, the law provides that the matter should be submitted to mediation (section 38(2) of the Act. Whether consultation is adequate depends on circumstances of each case. Where such consultation results in an agreement, signed by recognized representatives of the parties as was done in this case, then the requirement of the law has been met. In the circumstance of this case I find that the arbitrators conclusion on the issue was in err, I set aside that aspect of the award including the order for payment of 12 months' salary."

Basing on the above analysis, it is my opinion that the procedure for retrenchment were duly adhered by the applicant, I therefore fault the

arbitrators finding that the applicant failed to comply with the procedure for retrenchment.

In the case of **Hendry Vs. Adcock Ingram** (1988) 19 ILJ 85 (LC) at 92 B-C the Labour Court of South Africa held that:-

> **"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 entitled to restructure".**

In the circumstances of this case the respondents were fairly retrenched both substantively and procedurally, I fault the arbitrator's finding in regard to the same.

In regard to the third issue of relief, the arbitrator awarded the applicant 12 months' salary compensation for being unfairly terminated both substantively and procedurally. It is also from records that the applicants were paid all their retrenchment package as reflected **under MC 9** to wit, Notice pay, severance pay, Leave allowance as per Collective Bargaining Agreement , working days salary for August, leave pay and Certificate of Service.

In view of the finding of this court that the retrenchment was substantively and procedurally fair, the respondent s are not entitled to any compensation on the same. Therefore, I quash and set aside the arbitrator's order of 12 month's salary compensation to the respondents.

In the result I find the application with merits, I thus quash and set aside the CMA's award. It is so ordered.

Z.G.Muruke

JUDGE

14/08/2020

Judgment delivered in absence of all the parties, having notice through their respective advocates who attended hearing on 04th August,2020.

Z.G.Muruke

JUDGE

14/08/2020