IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT DAR ES SALAAAM

REVISION NO. 544 OF 2019

BETWEEN
RINGO R MOSES..... APPLICANT

VERSUS

LUCKY SPIN LTD (PREMIER CASIONO)..... RESPONDENT

JUDGMENT

Date of Last Order: 03/08/2020
Date of Judgment: 11/08/2020

Z.G. MURUKE, J.

The applicant **RINGO R MOSES** has filed this application under the provisions of Rule 24(1), 2(a),(b),(c),(d),(e),(f), 3(a),(b),(c) and (d) and Rule 28(1)(b),(c),(d) and (e) of the Labour Court Rules, 2007 GN No. 106 of 2007, read together with Section 91(1)(a),(2)(b) and (c) 94(1)(b)(i) of the Employment and Labour Relations Act Cap.366 RE 2019 [herein after referred to as Cap 366] praying for the revision of the award.

The application is supported by an affidavit sworn by the applicant herself. Edrick Luimuka, the respondent's Human Resource and Legal consultant filed a counter affidavit challenging the application.

The matter proceeded by way of written submission, whereby the applicant was served by advocate Cleophace James, while the respondent enjoyed the services of Advocate Edrick Luimuka.

The brief facts of the dispute is that, the applicant was employed by the respondent till 30th July, 2017 when she was retrenched basing on operational requirement. Being dissatisfied with termination, the applicant knocked the CMA's door, in which it was found that the retrenchment was fairly done. The applicant being dissatisfied with the decision, filed the present application on the following ground:

(a) That, the Honourable Arbitrator erred in law and fact in holding that the procedures during the retrenchment exercise were adhered to while there ample evidence and testimony before him proving that the retrenchment procedures were not followed by Respondent.

(b) The Honourable Arbitrator erred in law and fact when he failed to properly evaluate the evidence and testimonies before him and thereby arrived to an erroneous conclusion that the retrenchment exercise were adhered to by the Respondent.

(c) That, the Honourable Arbitrator erred in law and fact in holding that the Applicant failed to disprove that the Respondent consulted or involved the Applicant on their terminal benefits.

(d) Honourable Arbitrator erred in law and in fact that the Applicants prayers lacked merits and has no pegs on which to erect or lays its tent.

In support of the application the applicant's counsel submitted that the procedure for retrenchment were not complied by the respondent

contrary to Section 38 of Cap 366 and Rule 23 of the Employment and Labour Relations Act (Code of Good Practice) Rules, GN.42/2007 (herein GN.42). The Learned Counsel argued that for retrenchment exercise the employer is required to adduce sufficient reason for retrenchment and to follow the procedure for the same. He stated that the respondent through DW1 stated that the reason for retrenchment was Company's financial constraints caused by drop of sales between January and April and the changes of investors. The respondent failed to tender any documentary proof like financial statement to prove the financial difficulties. Under Section 38 (1) (c) (i) of Cap 366 that there must be a reason for retrenchment, referring the case of **Bakari Athuman Mtandika v Superdoll Trailer Ltd,** Rev. No. 171/2013 where it was held that:

> **" that the role of the court is to ensure that the operational reasons are not used by employer's pretext to terminate employee unfairly at the employer's will thus, circumventing the employee's right to security of tenure guaranteed by the parties contract of employment. The arbitrator is duty bound to inquire into and ensure that the employer has proved existence of fair reasons"**

Applicant counsel further stated that, the operational grounds must be genuine reasons to justify termination by operational requirements, referring the cases of **Samora Boniphace & 2 others Vs. Omega Fish Limited,** Rev. Appl. No.56 of 2012 [2014] LCCD 1 and the case of **V-Marche v Fitina Rashid Mloola** Rev. No. 371/2019 where it was held that; "I have not seen any evidence to prove that the said reasons nor proof of poor performance of the business." The employer ought to have

shared with targeted employees all documentary and other information pertinent to the retrenchment, such as financial statement and disclose changes of the shareholders.

It was further argued that the employees were given a five (5) days' notice of retrenchment, which is a short term notice. It was issued on 3rd July, 2017 and the meeting was held on 8th July, 2017. The respondent ought to have given enough time to prepare for consultation. Notice should have disclosed enough information and its intention of retrenchment and not during the meeting. The purpose of consultation was to allow the parties in form of joint problems to agree on reasons of retrenchment, measures to minimize the intended retrenchment, criteria for selecting the employees for termination, timing of retrenchment and the severance pay as provided under Rule 23(4) of GN 42, but all these were not reflected in the minutes of the meeting held in 8/7/2017. Also there is no explanation on measures that had been undertaken by the respondent to minimize the problem before deciding to retrench the applicant, referring the case of **Moshi University College of Cooperative and Business studies(MUCCOBS) v Joseph Reuben Sizya**, Rev.No.11/2012.

On his part Mr. Luimuka submitted that, the applicant and other employees were aware of the reason for termination. That PW2 in her testimony admitted to have known that the Company was to be sold and the restructuring of the casino was following a major change of shareholder. In rejoinder the Applicant's Counsel reiterated what he stated in his submission in chief. In addition he said, it was agreed that Collective Agreement to be signed on 17th August, 2017 but it was not clear on part

of the respondent why the collective agreement was signed on 31st August, 2017. It was disputed during trial and the respondent's counsel failed to account for it.

Having considered the parties submissions, records, and the applicable laws, this court is called upon to determine the following issues;

i. **Whether termination on retrenchment was based on a valid reason and stipulated procedures**
ii. **Reliefs of the parties.**

It is a settled principle of law 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. 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 42/2007.

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, this issue was not among the framed issues before CMA hence it was not determined though the arbitrator decided that the termination was fair.The law requires the employer to consult the employees on the reason for their termination. It is from records that the reason for the applicant's retrenchment was economic need, where the respondent alleged to have been operating below standards for about six months hence they incurred a number of liabities

and failed to run the business, they decided to invite another shareholder to run the business.

It is the requirement of the law under Section 38(1)(b) of Cap 366 RE 2019, that the employer has to disclose all the relevant information on the intended retrenchment. The respondent's argument that the applicant were aware that the company was to be sold to another major shareholder as submitted by the respondent's counsel, has no legal stance taking note that the applicant was not part of the management unless there is prove that he was availed with the relevant information in regard to the status of the company.

I concur with respondent submission as cited in the case of **Bakari Athumani Mtandika Vs. Superdoll trailer Ltd.** (Supra)where this case explained the basic duty of decision maker in unfair termination dispute, where operational reasons are raised as a cause for terminating an employee, among issues to be framed and determined should be whether or not operational grounds were genuine reason justifying termination or a pretext. It was the duty of the respondent to prove that they had a valid reason to conduct the retrenchment exercise as per Rule 39 of Cap 366 RE 2019 and as it was held in the case of **Sodetra (SPRL) Ltd Vs. Njellu Mezza & Another** Rev. No. 207 of 2008. From the evidence on records, **bearing the circumstances and nature of the respondent business**, I find operational requirement was reason for retrenchment. I understand not 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 Vs. 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 regard to procedural aspect, it is the position of the law that the employer have to adhere to mandatory procedures for retrenchment as provided by the law. In the labour laws the procedures are 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 by exhibits **LSL-3,** the minutes of the meetings held on 7th August, 2017 and 8th August, 2017 which were preceded by a notice dated 3rd July,2017. What is disputed is the duration of notice. Applicant claims that 5 days' notice was not sufficient for consultation. In our labour laws under Section 38(1) (a) of Cap 366 RE 2007 as cited above, requires the employer to give notice of the intention to retrench as soon as it is contemplated. Though the law is silent in regard to number of days for notice of retrenchment. It is my believe that all the procedure provided for retrenchment as cited above, have to be adhered communicatively. Since there is a proof that there were meetings for consultations, and the applicant attended through their representatives and agreed by signing to the agreement, this justifies that the five days were sufficient for consultation, in circumstances and nature of the respondent business.

Also in regard to explanation on measures that had been undertaken by the respondent to minimize the problem before deciding to retrench the

applicant. It is from the records, specifically exhibit LSL 3 the respondent explained on the measures they took to minimize the problem before the termination is effected.

Again the applicant has claimed that the Collective Agreement was signed on 17th August, 2017, but it was not clear on part of the respondent why the collective agreement was signed on 31st August, 2017. The applicant have not stated how she was affected with the same so long as the content of the agreement are the same it is still a valid agreement. In view of the above finding, I find that the applicant adhered to the procedures for retrenchment as provided by the law.

In addressing the second issue, it is undisputed that applicant upon termination, respondent paid all the entitlements including , leave allowance, severance pay, one month salary in lieu of notice, and 15 days salary as golden hand shake. There is no reason to revise the CMA decision. I totally agree with arbitrator decision, thus revision lacks merits. Accordingly dismissed.

Z.G.Muruke
JUDGE
11/08/2020

Judgment delivered in the presence of applicant in person and in the presence of Edrick Luimuka, advocate for the respondent.

Z.G.Muruke
JUDGE
11/08/2020