IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 645 OF 2019

BETWEEN

BROOKSIDE DAIRY (T) LTD..... APPLICANT

VERSUS

ALLY KOMBO MWACHIKOBE..... RESPONDENT

JUDGEMENT

Date of Last Order: 21/07/2020

Date of Judgement: 30/09/2020

Aboud, J.

The Applicant herein above filed the present application seeking revision of the award of the Commission for Mediation and Arbitration (herein CMA) which was delivered on 20/06/2019 in Labour Dispute No. **CMA/ARS/MED/548/2017** by Hon. Muhanika, J. Arbitrator. The application was 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, (henceforth the Labour Court Rules).

The application was supported by the affidavit of Patrick Wambua, applicant's Principal Officer. The respondent challenged the application through his counter affidavit.

Brief facts of the dispute are as follows; the respondent was employed by the applicant on 2007 as a Country Sales Supervisor on a permanent base contract in Dar es Salaam as reflected in his employment contract (Exhibit D1). On 2012, December the respondent was promoted to be Area Sales Manager where he was transferred to Arusha. On 04/09/2017 the respondent was retrenched from his employment on operational ground. Aggrieved by the applicant's act the respondent referred the dispute at the CMA claiming for unfair termination. In his finding the Arbitrator decided in favour of the respondent and awarded him 24 months salaries remuneration as compensation. Dissatisfied by the Arbitrator's award the applicant filed the present application praying for this Honourable Court to revise and set aside the Arbitrator's award.

The applicant filed the present application on the following legal grounds:-

i. That the award is tainted with material illegality on the face of record.

ii. The Arbitrator erred in law and in facts for holding that the complainant/respondent was unfairly terminated after holding that there was fair reason for termination.

iii. That the Arbitrator erred in law and facts for awarding the complainant/respondent a 24 (twenty four) months compensation, subsistence allowance inclusive notwithstanding the circumstances of the case.

iv. That the Arbitrator erred in law and in facts for finding that the applicant failed to transport the respondent to his place of recruitment.

v. That the Arbitrator erred in law and in facts for failure to properly asses the evidence on record henceforth reached on a wrong final decision.

The matter was argued by way of written submission. Both parties were represented by Learned Counsels. Mr. Zuri'el Kazungu

was for the applicant while Mr. Daniel Bushele John appeared for the respondent.

Arguing in support of the application Mr. Zuri'el Kazungu submitted that, the Arbitrator's finding that the termination was unfair after holding that there was a fair reason for such termination is erroneous and renders the award liable to be quashed and set aside. He stated that justice demands that where it is found that there was a fair reason for termination but the procedures were not complied, the punishment for non-compliance with the procedures should not be the same as if the termination was both substantively and procedurally unfair.

Mr. Zuri'el Kazungu went on to submit that the circumstances upon which the termination was under taken is a special reason qualifying to be an exception to the requirement of compliance with section 38 of the Act. He added that it was a special event which is so exceptional or out of the ordinary as to render compliance with section 38 reasonably impracticable, thus the Learned Arbitrator ought not to hold that the termination was procedurally unfair. He stated that, the restrictions of milk being the main business of the applicant from Kenya to Tanzania occurred abruptly and in no time,

which event was consequential to the applicant's entire business in that the respondent's post was suddenly automatically rendered redundant as its existence depended on the importation of milk and subsequent closure of the entire business.

Mr. Zuri'el Kazungu further submitted that, the applicant tendered Exhibit D5 being a letter offering the respondent a transport for his family and his belonging to his place of recruitment dated November, 2017. He stated that the respondent did not respond or act upon such letter, therefore he decided to forego such a right and he cannot be awarded. The Learned Counsel argued that, the Arbitrator ought to have considered such evidence in his conclusion. He stated that the said award ought to have given a clear analysis of the issue of subsistence allowance by showing the consequence of the letter by the applicant to the respondent. He therefore urged the Court to allow the application.

In response to the application Mr. Daniel Bushele John submitted that, the applicant has many employees but only the respondent was retrenched. He stated that even if the applicant had a good reason for retrenchment he ought to have followed the procedures stipulated under Rule 23 and 24 of the Employment and

Labour Relations (Code of Good Practice) GN 42 of 2007 (herein GN 42 of 2007) reads together with section 38 of the Act.

Mr. Daniel Bushele John strongly submitted that the award of 24 months is justifiable in the circumstances of this case. As to repatriation allowances he argued that, the applicant did not provide any means of transport and subsistence allowance to the respondent. He added that the applicant was supposed to mention the respondent's entitlements in her redundancy letter.

The Learned Counsel further submitted that, the applicant had no good reason to terminate the respondent and he did not follow the procedures provided by the law. He therefore prayed for the application to be dismissed.

Having gone through the rival submission by the parties, Court's records and relevant labour laws and practice I find the issues for determination before the Court are; whether the applicant had valid reason to terminate the respondent, whether the applicant followed procedures in terminating the respondent and to what relief are the parties entitled.

On the first issue as to whether the applicant had a valid reason to terminate the respondent. It is a trite law that employer's are obliged to terminate employees on valid and fair reason only. In this application the respondent was terminated on the ground of retrenchment. The circumstances that might legitimately form the basis of termination on the ground of retrenchment are provided under Rule 23 (2) of GN. 42 of 2007 which provides as follows:-

> "Rule 23 (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."

[Emphasis is mine].

The applicant's witnesses testified at the CMA that, the reason for retrenchment is restructuring as a result of suspension by the government of importation of milk from Kenya to Tanzania. Such reason falls within Rule 23 (2) (c) of the provision quoted above. The applicant tendered his email conversations (Exhibit D3 collectively) to prove his reason for retrenchment.

Under the circumstances, it is my view that the applicant had a valid reason to terminate the respondent's employment. Importation of milk being the main business of the applicant I believe when it was restricted it had directly affected the applicant's nature of business and its running. Therefore, the applicant as a company had a good ground of restructuring the Company which rendered the respondent's position redundant. Thus, I find no reason to fault the

Arbitrator's reasoning that the applicant had a valid reason to terminate the respondent's employment.

On the second issue that whether the applicant followed termination procedures, the Court considers that the respondent was terminated on the ground of retrenchment where its procedures are provided under section 38 of the Act. I quote the relevant section for easy of reference:-

> "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,

[Emphasis is mine]

The above stipulated procedures and principles are mandatory requirements and must be followed by any employer who decides to terminate his employees by retrenchment. The section is in pari materia with Rules 23 and 24 of GN 42 of 2007. The applicant did not dispute the fact that the above stipulated procedures were not followed at all. Mr. Zuri'el Kazungu argued that in the circumstances of this case the applicant had no time to adhere to the above quoted procedures. The learned Counsel stated that the restriction occurred abruptly and in no time.

I have careful examined the email conversation (Exhibit D3 collectively) it is revealed that the applicant was informed of the said prohibition/importation of milk restriction on 28/06/2017 while the

respondent at hand was retrenched on 04/09/2017. The applicant took almost three months to retrench the respondent from when he was notified of the prohibition to the date of retrenchment. Under such circumstances, it is my view that the applicant had ample time to adhere to the above stipulated procedures but he opted not to do so on his own whims. In my view the period of almost three months is not as abruptly as the applicant's Counsel would wish this Court to believe.

In this application there was no notice of retrenchment, no consultation meeting was done and the criteria for selection were unknown. The decision to terminate the respondent was made while he was on annual leave therefore the argument that the respondent was verbally consulted as testified by DW2 is not backed up with evidence. The record of this case leaves the Court with an option that the respondent was the only employee who was retrenched from his employment since the applicant did not even bother to produce evidence to prove if other employees were also retrenched.

On the basis of the above discussion it is my view that the retrenchment procedures were not followed by the applicant which suffices to say that the respondent was unfairly terminated from his

employment which deprived him the right to be heard on the said retrenchment as rightly found by the Arbitrator.

On the last issue as to relief of the parties. The applicant urged the Court to reduce the amount of the award on the reason that it was only the procedures for retrenchment which were not followed while the applicant had valid reason to retrench the respondent. In other words the termination of the respondent was only unfair procedurally and substantially fair. I wish to emphasis that the provision of section 40 (1)(c) of the Act on award of compensation for unfair termination did not empower the Arbitrator/Court to reduce the amount stipulated in the event only the procedures for termination were not followed. So long as an employee is unfairly terminated be it substantively or procedurally he is entitled to compensation of not less than 12 months. The Court is mindful that it has discretion to award compensation of more than 12 months salaries, but there must be justifiable reason to do so which depends on the circumstances of each case.

At the CMA the respondent was awarded 24 months salaries compensation. In my view under the circumstances of this case where the applicant's business was negatively affected by the

restriction order of the government I find the award of 24 months is too excessive and a severe punishment to the applicant which is not the objective of the labour laws as provided under section 3 of the Act. That being said I therefore reduce the same to 12 months salaries as stipulated under section 40 (1) (c) of the Act.

On the award of repatriation costs, the Court notes that as per the letter dated 18/11/2017 (Exhibit D5) the respondent was informed to communicate with the Chief Accountant to be paid the allowances in issue. However, the respondent did not do so. Under such circumstances it is my view that the respondent is not entitled to subsistence allowances as claimed because the applicant dully prepared for his payment but he neglected to collect the same. Thus, the respondent cannot benefit from his own wrong. He is therefore only entitled to repatriation costs from Arusha to Dar es Salaam as his place of recruitment provided under section 43 of the Act.

In the result I find the present application to have partly succeeded. The Arbitrator's award is hereby revised and set aside to the extent that the applicant is ordered to pay the respondent compensation of 12 month salaries for unfair termination and,

transport allowances for him and his family to the place of recruitment.

It is so ordered.

I.D. Aboud

JUDGE

30/09/2020