THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

LABOUR COMPLAINT NO. 01 OF 2017

DAVID L. MWAKASALA AND 12 OTHERS.....COMPLAINANTS

VERSUS

MCC LIMITED.....RESPONDENT

JUDGEMENT

Date of Hearing : 25/06/2020
Date of Judgment: 05/08/2020

MONGELLA, J.

The complainants herein were employees of MCC Limited, the respondent herein. They were retrenched on 31st December 2016 following a collective agreement. The complainants' claim is that they were underpaid the terminal benefits to wit, loss of income benefit, contrary to the terms set out in the collective agreement, particularly clause 18.3.0. The issue for determination of this matter is therefore:

> *"Whether the complainants were underpaid when being paid their loss of income compensation as per the collective agreement."*

Both parties were represented whereby the complainants were represented by Mr. Evans R. Nzowa and the respondent was represented by Mr. Fredrick Mbise, both learned advocates. During the hearing, the complainants mounted one witness while the respondent mounted two witnesses.

CW1, David Mwakasala gave a sworn testimony to the effect that in this matter there are thirteen claimants who have been retrenched by the respondent company. He said that the retrenchment took place on 31st December 2016. He tendered termination letters for all claimants which were admitted collectively as "exhibit C1." He said that the complaint regards underpayment of their benefit following their employer's disregard of clause 18.3.0 of the agreement between the employer and the trade union named COTWU (T). The collective bargaining contract was admitted as "exhibit C2."

CW1 stated further that as per clause 18.3.0 of the contract, the employer was supposed to take the last salary and multiply by 12 months. However, he instead took one salary for the year 2016, 2015, 2014, 2013, 2012, 2011, 2010, 2009, 2008, 2007, 2006 and 2005 and added the figures. He said that the last salary was supposed to be used because on the past years the salary was so minimal. He ended by praying for the court to compel the employer to calculate their benefits by using the last salary and pay them the balance.

In his final submission, Mr. Nzowa interpreted the phrase "*one month basic salary for each year of service as a compensation for unexpected loss of*

employment to a maximum of 12 months" under clause 18.3.0 to mean for each year of service the employee shall get one month basic salary maximum being twelve months. He said that the figure is to be calculated by using the last basic salary multiplied by 12 months. He argued that according to the law and practice all terminal benefits are calculated based on the employee's last salary and not otherwise. He referred the court to the case of ***Walwa F. H. Kavellah na Wenzake 45 dhidi ya N.D.C***, Mgogoro wa Kikazi Na. 148 of 2002 determined by the defunct Industrial Court of Tanzania. He said that in this case, the Chairman (Mwipopo, J. as he then was) ruled that the last salary of the employees is the one to be used in calculating their benefits. He as well borrowed leaf from section 42 (1) of the Employment and Labour Relations Act, 2004 which provides for calculation of severance pay basing on the last salary. He argued that under this provision the same words, that is, "*for each year of service*" has been used just like in the collective bargaining agreement. He also cited the case of ***Lusekelo Chotimbao Nyagawa v. Mufindi Tea and Coffee Co. Ltd***, Application No. 14 of 2008 in which this Court as well calculated severance pay by using the last salary.

Mr. Nzowa differentiated the phrases "*for each year of service*" and "*of each year of service*." He argued that the word "of" means 'possession' or 'belongs to.' He therefore contended that the phrase "*of each year of service*" can be interpreted to mean '*it belongs to a particular year of service*." In his view, the two phrases are different contrary to what was stated by the respondent's witnesses to the effect that they mean the same thing. He concluded that the method used by the respondent in calculating the compensation for unexpected loss of employment by

picking a one month salary from each year backwards to 2005, instead of using the last basic salary times twelve months was wrong and aimed at underpaying the complainants and benefits the respondent illegally. To bolster his argument he referred to the case of ***Michael David Mwampinia & 24 Others v. MCC Ltd.***, Labour Dispute No. 4 of 2017 (HC at DSM, unreported) in which it was held:

> *"The relevant paragraph 18.3.0 in exhibit "P1" above in my view is very clear as to what exactly was supposed to be paid to the complaints. The word "one month basic salary for each year of service" I would say meant the salary which the complainants earned at the time they were retrenched and not otherwise. I am of the considered view that, had it been the relevant paragraph stated that one month salary of each year of service, that would have meant the basic salary of those years from 2016 when they were retrenched to backwards. Therefore, the proper salary was the salary they were earning at the time of termination through redundancy and not taking salary from each year from the time they were employed as the respondents did...*
> *In the circumstances of this case and on the basis of the above discussion I do not hesitate to subscribe to the decision of the defunct Industrial Court in the case of* ***Walwa F. H. Kavellah na Wenzanke 45 dhidi ya N.D.C. Mgogoro wa Kikazi*** *Na. 148 wa Mwaka 2002, Mwipopo J, (as he then was)...*
> *The complainants were therefore underpaid as claimed just because the employer in calculating their terminal benefit used incorrect salary basis...*
> *In the circumstances the Court orders the respondent to calculate the complainants' compensation for unexpected loss of employment using proper method, which is by using the rate of their last basic salary on termination in 2016, for twelve months as agreed in the collective agreement."*

On the other hand, DW1, one Geoffrey Lucas Narine, a human resource manager at the respondent's company, also under oath, testified that the claimants were employed by the respondent and were retrenched following the company's failure to run its business smoothly for three consecutive years. He said that the retrenchment was therefore for purposes of reducing production costs. He testified further that the company communicated with the workers' union, COTWU (T) so as to agree on the procedure that will assist both parties to reduce the running costs which directly concerned workers. They held a meeting to discuss on some of the provisions in the collective bargaining agreement to reduce costs on payment to workers. He said that they discussed some of the provisions, especially clause 18.3.0 which concerns payments on retrenchment, so that it is amended from 24 months to 12 months. He said that the said discussion led to a huge dispute whereby both parties did not reach an agreement. The said dispute forced them to refer the matter to the Commission for Mediation and Arbitration (CMA) for solution by filling in CMA Form No. 1 (which was admitted as "exhibit D1").

DW1 continued that the CMA resolved the dispute whereby an agreement was reached on the disputed provisions, particularly on clause 18.3.0 of the agreement. After that an agreement of signing the new collective bargaining agreement, exhibit C2 was reached. He said that the clause reads "*one month basic salary for each year of service to the maximum of up to 12 months.*" He said that the clause meant that they would get one month salary for each year that the employee worked to a maximum of 12 months. He tendered a mediation certificate of settlement from the CMA which was admitted as "exhibit D2." He

concluded that after that the collective agreement was signed and is the one used to date.

DW2, John Samson Malenga, an accountant at MCC Limited, testified that he was the one who prepared the complainants payments after the retrenchment. He said that he prepared the payments by using the law and the collective bargaining agreement between the workers and the management, particularly clause 18.3.0. He said that in accordance with the provision the employees were to be paid one month salary for each year of service to the maximum of 12 months. He said that as per clause 18.3.0 the complainants were not underpaid. On cross examination he said that the complainants were paid other benefits including transport, one month notice, fare for the employee, his spouse and 4 dependants and severance pay which was calculated at 7 days salary per month to a maximum of 10 years.

Mr. Mbise in his final submission submitted that the Collective Bargaining Agreement was prepared by COTWU (T) and brought to the employer, the respondent, for negotiations. Referring to "exhibit P-1" he said that COTWU (T) being a recognised trade union, represented the majority of the complainants in this matter in an appropriate bargaining unit and is still recognised as the exclusive bargaining agent entitled to sign the Collective Bargaining Agreement. He contended that the object of the Collective Bargaining Agreement interpretation was to ascertain objectively the mutual intention of the parties as to the legal obligations each assumed by the contractual words in which they sought to express. He was of the view that once the Collective Bargaining Agreement is

signed it becomes binding upon the parties and any other party as provided under section 71 (2) of the Employment and Labour Relations Act.

Mr. Mbise proceeded to provide the chequered history of the negotiations between the parties before this dispute was filed in this Court. He said that four years back, the respondent together with the trade union which represents the complainants had a labour dispute at the Commission for Mediation and Arbitration (CMA) at Temeke with reference number CMA/DSM/TEM/83/2014. That before the referral of the dispute to CMA, the parties, being the respondent and COTWU (T) held a meeting on 26th August 2013 to negotiate the terms and conditions of the Collective Bargaining Agreement, whereby one of the issues addressed was that the company was going towards a down spiral. He said that among the areas of contention was clause number 18.3.0 of the Collective Bargaining Agreement. At the CMA, before Hon. Johnson Faraja (Mediator), the parties reached a consensus and settled the matter through CMA Form no. 1, the referral form (exhibit D-2), and Form no. F5, the certificate of settlement (Exhibit D-1).

He further argued that the issue that formed the point of contention in the CMA in respect of clause 18.3.0 of the Collective Bargaining Agreement is the same issue brought before this court. The issue was with respect to the interpretation of clause 18.3.0 on the mode of calculating the retrenchment packages of the complainants, whereby the respondent's concern was on the effect it shall have on his business if the calculation is done as claimed by the claimants. He was of the view that it is absurd to

see that the same issue which was settled already at the CMA between the parties in 2014 being brought to this Court by the parties in 2017.

Turning to the real issue for determination in this matter, Mr. Mbise first challenged Mr. Nzowa's reference on the number of days used to calculate severance package. He said that that is an issue which is subject of another case also pending before this Court in Revision Application No. 73 of 2017, hence inapplicable in the matter at hand. He then proceeded to argue that the key phrase under clause 18.3.0 giving rise to the dispute at hand is "**each year of service.**" He was of the view that this phrase does not mean "**Last Salary**" as contended by the complainants. He further submitted that when the complainants were retrenched, they were paid all their statutory compensation as per section 44 (1) of the ELRA to wit, one month pay in lieu of notice, leave days, severance allowance, and other terminal benefits as set out in the Collective Bargaining Agreement. Regarding compensation for loss of income, the respondent paid one month's salary for each year of service. He said that the complainants were retrenched in 2016 therefore the respondent took one month salary which is the highest for each year starting 2016 downwards for each year to the maximum of 12 moths. He stated that this calculation was as per the interpretation of clause 18.3.0 that both parties had agreed.

He further reiterated his position that it is only parties to the agreement that can ascertain objectively their mutual intentions as the parties in this matter had reached a common objective of interpretation over the disputed clause in the Collective Bargaining Agreement. He argued that

parties to the agreement might be having a particular clear meaning of the phrases in the agreement, but when the same is placed before the court, the court might have a different meaning. He thus was of the position that the court must place itself in the "matrix of facts" as that in which the parties were placed when entering into the Collective Bargaining Agreement.

He argued that the formula claimed by the complainants of using the last month salary times twelve months is a way of destroying the respondent's company. He contended that the same shall amount to paying the complainants severance allowance twice which is illogical. He was of the view that the Collective Bargaining Agreement serves the purpose of improving employment and labour relations set out under the law and the employment contracts and not to act as tools to oppress the employer. Practically, Mr. Mbise lamented that if the formula demanded by the complainants is to be applicable, the same cannot work because the amount to be paid is very huge compared to the number of employees and the respondent cannot maintain such costs.

On an endeavor I failed to comprehend the relevance of, Mr. Mbise cited South African cases of ***Mzeku & ORS v. Volkswagen South Africa & ORS*** [2001] 8 BLLR 857 (LC); ***SACCAWU v. Shakaone & Others*** [2000] 10 BLLR 1123 (LC); and that of ***Larbi-Odam v. MEC for Education*** (1998) (1) SA 745 (CC) and argued that as per these cases, the Collective Bargaining Agreement can only override the statutory provisions if it provides higher standards than those provided under the law and to the betterment of the parties. I say that I failed to comprehend the relevance of referring to

these cases because he did not state which statutory provision has the Collective Bargaining Agreement in question in this matter overridden. I shall therefore not allow this argument to detain me.

He concluded that the complainants' claims are baseless because they have failed to establish what they exactly claim against the respondent. He contended that the complainants ought to have stated the amount which they claim to have been underpaid, but they failed to do so thus rendering their claim baseless. He thus prayed for the matter to be dismissed in its entirety.

After considering the evidence adduced by the witnesses from both parties and the arguments by the learned counsels, I am of the settled conclusion that the dispute in this matter lies with the interpretation of clause 18.3.0 of the Collective Bargaining Agreement. For ease of reference I wish to reproduce the clause as hereunder:

> **"REDUNDANCY TERMINAL BENEFITS**
>
> ***18.3.0 One month basic salary for each year of service as a compensation for unexpected loss of employment to a maximum of 12 months."***

Considering the arguments by both parties, the contention in this provision again lies on the phrase "...for each year of service...to a maximum of 12 months" particularly on the salary to be used in the calculation. While the applicant's claim that the salary to be used is the last salary payable on the date of retrenchment, the respondent's stance is that the highest

salary that was paid in each year of service is to be used in calculating the retrenchment package. Mr. Mbise argued that the dispute on the interpretation of this clause was referred to the CMA whereby an agreement was reached. I have gone through exhibit D-2 which is the "Mediator's Certificate of Settlement." In this document, the Hon. Mediator commented as follows:

> ***"Wadaawa wamekubalina kama Collective Agreement Contract ya 28/7/14 ionyeshavyo ili kumaliza mgogoro huu leo. Hivyo mgogoro umefikia mwisho, kwa makubaliano hayo"***

Basically, what the Hon. Mediator commented as seen above was that the parties have agreed as to the terms set out in the Collective Bargaining Agreement. The Hon. Mediator in fact referred back to the terms provided in the CBA. In my considered view, the Hon. Mediator did not provide any interpretation to clause 18.3.0 as agreed by the parties as claimed by Mr. Mbise. This situation therefore leaves the interpretation of clause 18.3.0 still long desired.

As pointed out earlier, the point of contention in the said clause stems from the phrases "**for each year of service...to a maximum of twelve months.**" Mr. Nzowa argued that the phrase "**for each year of service**" differs from the phrase "**of each year of service**". He was of the position that if the latter phrase was the one stated in the clause in dispute, then the respondent would have been right in using one month salary that was paid in each year of service. This is because in his interpretation the word "of" connotes possession. It is unfortunate that Mr. Mbise did not endeavor

to provide an interpretation of the phrase "for each year of service" for this Court to scrutinize. He only argued that the interpretation was settled by the CMA, but I found that claim not substantiated after scrutinizing what was stated by the Hon. Mediator as demonstrated above. I wish also to consider his argument that Mr. Nzowa brought up an issue of severance pay which is a subject of another matter pending in this Court. With all due respect, Mr. Nzowa did not do that. What he did was just to borrow a leaf from section 42 (1) of the Employment and Labour Relations Act providing for severance pay in an effort to interpret the phrase "for each year of service" because the said provision is provided in similar terms.

My position however, is in line with what Mr. Nzowa argued. In my considered opinion, the phrase "**for each year of service**" means that one specific figure is to be applied on each year of service to a maximum of twelve months. What follows therefore is the question as to which exact figure or salary is to be applicable? In my settled view, this certainly must be the last salary the complainants were paid during retrenchment. On this, I in fact align myself with the reasoning of my learned sister, Abood, J. in ***Michael David Mwampinia & 24 Others v. MCC Ltd.*** (supra) to the effect that if clause 18.3.0 had stated that "***one month basic salary of each year of service***" then the calculations as done by the respondent would be correct. This is however, not the case in the matter at hand. In addition, I am also of the view that, the previous salaries cannot be used because they are already affected by inflation. The fact that the salaries got changed was in my view, among other things, to deal with the effects of inflation. Under the circumstances, it shall therefore be quite unfair to use

salaries that the complainants used to be paid twelve or ten or five months ago to calculate their retrenchment package.

Having observed as hereinabove, it is my finding that the complainants were underpaid as they claim because the employer in calculating their terminal benefit applied incorrect salary basis. In the circumstances the respondent is hereby ordered to calculate the complainants' compensation for unexpected loss of employment using proper method, which is by using the rate of their last basic salary on termination on 31st December 2016, to a maximum of twelve months as agreed in the Collective Bargaining Agreement and pay them the remaining balance.

Dated at Mbeya on this 05th day of August 2020.

L. M. MONGELLA

JUDGE

Court: Judgment delivered in Mbeya in Chambers on this 05th day of August 2020 in the presence of both parties.

L. M. MONGELLA

JUDGE