IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 371 OF 2019

BETWEEN

V- MARCHE LIMITED ..... APPLICANT

VERSUS

FITINA RASHID MLOOLA ..... RESPONDENT

JUDGMENT

Date of Last Order: 05/02/2020

Date of Judgment: 20/03/2020

S.A.N. Wambura, J.

The applicant **V- MARCHE LIMITED** has filed this application under the provisions of Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d), 11 and 28(1)(a)(b)(c)(e) and 55(1) and (2) of the Labour Court Rules, GN No. 106 of 2007, read together with Section 91(1)(a)(b), (2)(a)(b), (4)(a) and 94(1) of the Employment and Labour Relations Act No. 6 of 2004 [herein after to be referred to as ELRA] praying for the following Orders:-

1. *That this Honourable Court be pleased to revise and set aside both the proceedings and Award issued by Hon. Mpapasingo,*

B. Arbitrator, in the Labour Dispute No. CMA/DSM/ILA/757/18/475 which was delivered on the 22nd March, 2019.

2. *Any other relief (s) that the Honourable Court may deem fit to grant.*

The application is supported by a sworn affidavit of Laurensia John, the Principal Officer of the applicant.

The respondent **FITINA RASHID MLOOLA** filed a counter affidavit challenging the application.

The applicant enjoyed the legal services of Mr. Christopher Mumanyi - Personal representative, while the respondent was represented by Ms. Renatha Byabato Advocate.

With leave of this Court hearing was by way of written submissions. I am thankful to both parties who complied with the schedule and for their submissions.

The brief facts of this matter are that, in 2015 the respondent was employed by the applicant as a Sales Assistant. The applicant allegedly

faced economic crisis due to lack of customers. In order to rescue the situation, the applicant decided to retrench some of his employees. On 28th June, 2018, the respondent and other employees were retrenched.

Aggrieved with the exercise, the respondent filed a complaint at the Commission for Mediation and Arbitration [herein after to be referred to as CMA], which decided in her favour. Aggrieved with the award, the applicant has now filed the present application praying for its revision on the following grounds:-

1. *That, the arbitrator erred in law and fact by bias evaluation and ignoring the applicant's evidence without any justifiable reason.*
2. *That, the arbitrator erred in law and fact to decide that there was no reason for termination.*
3. *That, the arbitrator erred in law and fact by deploying unfair termination without any proof.*

Submitting on the 1st ground, the applicant stated that, the Arbitrator overlooked the evidence adduced by the applicant and ruled in favour of the respondent. That, the respondent had not proved her claims

against the applicant. That no evidence was produced so as to move CMA to decide in her favour. The applicant made reference to the respondent's claim that she had a fixed term contract, and without any proof regarding the same the Arbitrator awarded her twelve (12) months' salary as compensation.

On the 2nd ground, the applicant averred that, the reason for terminating the respondent was on operational requirements. The company was facing economic crisis, hence some of the workers were to be retrenched. The company could not have survived without doing so. It would have failed to operate and failed to pay salaries to the employees. Therefore, the arbitrator was wrong in ruling that the applicant did not have a valid reason for terminating the respondent.

On the basis of the 3rd ground, the applicant stated that the Arbitrator erred in law and fact by deploying unfair termination without any proof. He was supposed to satisfy himself that the respondent was truly unfairly terminated. They referred to Rule 9 (3) of the Employment and Labour Relation (Code of Good Practice) Rules, GN. 42 of 2007.

It was argued that, under Rule 9(4) of the Code the reason that may justify termination by the employer is operational requirements. Thus, the respondent was not unfairly terminated.

They thus prayed for this Court to revise and set aside CMA's award.

In response to the applicants averments, the respondent contended that:-

(i). The applicant failed to prove that prior to terminating the respondent, the applicant had informed her of the financial situation. That failure to do so, is enough to conclude that the applicant had not followed the procedures for retrenchment as provided for under Rule 23(1) and Rule 24 of the Code read together with Section 38 of ELRA.

(ii). The applicant alleged to have had a valid reason for terminating the respondent. But he failed to prove the same since he terminated the respondent without telling her any reason. That the reason for termination was only known to the applicant and not the respondent.

(iii). That termination on operational requirement can stand as a good reason for termination only if the applicant could have followed the procedures as stated in Rule 9(5) of the Code, and proved the same at CMA. That, the applicant failed to prove the same, citing Rule 23(3) of the Code which provides that:-

"Rule 23(3) The Court shall scrutinize a termination based on operational requirement carefully in order to ensure that the employer has considered all possible alternatives to terminate an employee before the termination is effected."

That the applicant had not consulted the respondent nor convened any meeting in order to term it as fair and adequate consultation before termination.

It was submitted by the respondent that the Arbitrator was right in awarding 12 months' salary as compensation due to both substantive and procedural unfairness. They referred to the case of **Leza Ally Mnukwa V Mtibwa sugar Estates Ltd**, Rev. No. 339/2013 LCCD 2014 Part II and prayed for dismissal of the application.

Having gone through the adverse submissions, I believe this Court is called upon to determine the following issues:-

1. *Whether or not the applicant had a valid reason for retrenching the respondent.*
2. *Whether or not the procedures for retrenchment were adhered to by the applicant.*
3. *The reliefs which both parties are entitled to.*

1. Was there a valid reason for the applicant to retrench the respondent?

I find it worth to first define what is meant by retrenchment. Retrenchment refers to termination of an employee due to operational requirements of the law.

Section 4 of the ELRA defines operational requirement of the law, as requirements based on the economic, technological, structural or similar needs of the employer. The employer may decide to reduce the number of his employees in order to protect his business by either increasing the profit or by reducing costs.

In order to have fairness of termination of employment on operational requirements the employer must adhere to Section 38 of the ELRA, which 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].

Rule 23 of the ELRA (Code of Good Practice) of GN 42/2007 also 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].

There is no doubt therefore, that the *retrenchment process must be adhered to in good faith by the employer who must prove that they have shared with the targeted employees all documentary and other information pertinent to the retrenchment.*

Courts are required to scrutinize the process carefully in order to ensure that the employer considered all possible alternatives prior to retrenchment.

Articles 13 and 14 of ILO Convention No. 158 which covers retrenchment, provide for identification of the measures required to avert or minimize the termination and measures to mitigate the adverse effects of termination on the workers such as finding alternative employment.

Article 14 of the Convention stipulates that a certain amount of relevant information must accompany the notification.

The applicant herein alleged that the respondent was retrenched as they faced economic crisis in their business due to lack of customers. That prior to termination, they held consultations and arrived at an agreement to retrench the respondent and 6 other employees. Thus termination of the respondent was fair as it was due to operational requirements.

The respondent contended that she was neither notified on the retrenchment exercise nor the reason for termination.

It was CMA's finding that, the applicant had no valid reason for terminating the respondent as the applicant failed to prove the economic crisis and the agreement between them.

It is a principal of law that, for termination based on operational requirements, the employer has to disclose to the employee the economic status of the business.

It was the duty of the applicant therefore to prove that they had a valid reason to conduct the retrenchment exercise as per Rule 39 of ELRA as it was also held in the case of **Sodetra (SPRL) Ltd Vs. Njellu Mezza & Another,** Rev. No. 207 of 2008. Respondents also had to disclose the number of employees who would be affected by the exercise.

There is no proof that the applicant was in financial crisis as was held in the cases of **Sharaf Shipping Agency (T) Ltd Vs. Bacilia Constantine & 5 Others**, Labour Rev. No. 579/2017 and **NUMET Vs. North Mara Gold Mine Ltd,** Rev. No. 6/2015.

There is no explanation on measures that had been undertaken by the respondents to minimize the problem before deciding to retrench the applicant as was held in the case of **Moshi University College of**

Cooperative & Business Studies (MUCCOBS) Vs. Joseph Reuben Sizya, Rev. No. 11/2012.

It is my belief that the reasons for retrenchment have to be clearly stated and elaborated. Incidentally that was not done.

In perusing the record, I have not seen any evidence to prove the said reason nor proof of poor performance of the business. As it stands it is as if the Management did not want the respondent to remain in employment and decided to get rid of her. This is contrary to the law as per Sections 38 and 39 of ELRA, and as cemented in the South African case of **Mtetwa V. Howden Africa (Pty) Ltd** (JS90/16) [2017] ZALCJHB363.

I therefore join hands with the Arbitrator in finding that the applicant had no valid reason for retrenching the respondent.

2. Did the applicant adhere to the procedures in terminating the respondent?

The procedure for termination has been provided for in Section 38 of ELRA. That the employer has to issue notice and hold consultations with the employees when the need for retrenchment arises. Having gone through the record, I found no notice which was issued to the respondent.

In the case of **Samora Boniphace & 2 others V Omega Fish Ltd,** Rev. No. 56/2012, It was stated that:-

> *"It is clearly provided that, employer is required to give notice of an intention to retrench as soon as retrenchment is contemplated."*

There is again no proof that consultations took place as stated by the applicant that they had several discussions with the respondent and agreed to retrench her. DW1 could not produce any documents nor verify if there were any on record. This includes the retrenchment agreement.

Failure to issue notice and hold consultations vitiates the procedures for retrenchment as was also held in the case of **Knight Support (T) Ltd Vs. Abraham Ngeuke & 11 Others**, Labour Rev. No. 33 of 2015.

So one can safely say that the procedures for terminating the respondent were not adhered to.

3. What are the reliefs entitled to the parties?

In CMA Form No. 1 the respondent prayed for the following reliefs:-

1. Twelve (12) months' salary as compensation for unfair termination Tshs. 250,000/= x 12 = Tshs. **3,000,000/=**.
2. One (1) month's salary in lieu of notice Tshs. **250,000/=**.
3. Leave Tshs. **250,000/=**.
4. Severance allowances Tshs. 250,000/=/26 x 7 x 3 = Tshs. **201,923/=** the Total being Tshs. **3,701,923/=**.
5. Certificate of Service.

CMA awarded the respondent all the reliefs as prayed for.

The applicant has challenged the award stating that it was uncalled for as the respondent had a fixed term contract of employment. However, as stated earlier the contract of employment was not tendered as an Exhibit to that effect, so one cannot act on verbal allegations.

Thus, having found that the applicant did not have valid reasons for termination nor did they comply to the procedures in terminating the respondent, I uphold CMA's award and dismiss the application for want of merit.

S.A.N. Wambura
JUDGE
20/03/2020