IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 642 OF 2019

BETWEEN

RESOLUTION INSURANCE LTD..... APPLICANT

VERSUS

EMMANUEL SHIO & 8 OTHERS ..... RESPONDENT

JUDGEMENT

Date of Last Order: 19 /05/2020

Date of Judgement: 29/05/2020

Aboud, J.

The Applicant **RESOLUTION INSURANCE LTD** filed the present application seeking revision of the award of the Commission for Mediation and Arbitration (herein CMA) in Labour Dispute No. **CMA/DSM/KIN/R.810/18** which was delivered on 26/06/2019 by Hon. Kiangi. N., 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 (herein the Rules).

The applicant supported the application by the affidavit of **MELCHIZEDEK NYAU** the applicant's Principle Officer. On the other hand respondents challenged the application through their joint counter affidavit.

Brief facts leading to the present application are as follows; the respondents were employed by the applicant on different dates as per their employment contracts. On 03/07/2018 and on 10/07/2018 the respondents were retrenched from their employment, basing on the applicant's structural and economic reason that the company was making loss for 8 years thus adjustments had to be made to rescue the company. Upon termination the applicants were paid accrued salary up to 10/07/2018, outstanding annual leave allowance, severance pay, medical insurance up to 31/12/2018, certificate of service and other outstanding dues. Dissatisfied by the applicant's decision to retrench them, the respondents referred the dispute to CMA. CMA decided on the respondent's favour on the basis that the applicant had valid reason to retrench the respondents but the procedures to do so were not followed. In the CMA award the

applicant was ordered to pay the respondents compensation of twelve (12) months salaries to each following the unfair termination of their employment. Aggrieved by the CMA's award the applicant filed the present application seeking for the court to set aside the said award.

The matter proceeded by way of written submission. Both parties were represented by learned counsels. Mr. Shukrani Elliot Mzikila was for the applicant while Mr. John Lingopola appeared for the respondents.

Arguing in support of the application Mr. Shukrani submitted that the Honourable Arbitrator failed to demonstrate under which provision of the law she was driven to the position that, the notice period of retrenchment in question was too short. The Learned Counsel argued that, the law is silent on how many number of days consultation process is required to take place before resorting to retrenchment. He stated that the notice in retrenchment process serves a different purpose or objective, that is, to facilitate effective pre-retrenchment consultation. This is the position in the case of **Samora Boniphace & 2 others Vs. Omega Fish Limited,** Rev. Appl. No.56 of 2012 [2014] LCCD 1.

Mr. Shukran submitted that, respondents were clearly notified and consultated about their retrenchment as testified by Mr. Melchizedek Nyau (DW1) before CMA. The learned Counsel strongly argued that, if the respondents were dissatisfied with the retrenchment process they should have not signed the minutes, accepting the terminal benefit packages, but they would have opted to refer the matter to CMA as the law requires under section 38 (2) of the Act.

The Learned Counsel further submitted that, the Honourable Arbitrator failed to consider the nature of the applicant's business. That the applicant runs insurance business which deals with bulky of monies deposited by client for the purpose of insurance, therefore it was unlikely for the applicant to continue with the service of the respondents while the business situation required restructuring. He stated that respondents were aware of the retrenchment process. He also stated that the Honourable Arbitrator wrongly held that there were no clear selection criteria for retrenchment. The Learned Counsel further argued that, there was ample evidence adduced at CMA which apparently vivid demonstrated the selection criteria for retrenchment as testified by DW1 and as embodied under Rule 24 (3)

of Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007 (herein The Code).

Mr. Shukran argued that, under the principle of retrenchment the Company or organization is not supposed to treat all the requirements stipulated under the law in a check list fashion. He however submitted that the employer is supposed to do as possible as it could to adhere to the retrenchment process. He said in this matter, the Arbitrator wrongly awarded the respondents 12 months compensation because according to her finding, only the procedures for retrenchment which were not followed and reason for was valid. Mr. Shukran referred the Court to case of **Matilda Gerase Rwebugisa Vs. Blue Rock Spur Ltd.**; Rev. No. 121 of 2017 (unreported) to robust his argument. He finally prayed for the CMA award to be revised and set aside.

Responding to the application Mr. Lingopola submitted that, on the issue of notice the law is very clear under the provisions of section 38 (1) (a) of the Act, that, it is mandatory required to give notice as soon as the retrenchment was contemplated. He stated that in this matter the notice was not given as required by the law, because the applicant was aware that the business trend necessitated

termination for operational requirement of the intended retrenchment since 31/12/2017 and the notice was issued to the respondents on 02/07/2018 followed by their termination on 03/07/2018.

Mr. Lingopola further submitted that, though the law is silent on the notice period but the same should be reasonable to facilitate effective pre-retrenchment consultations as provided under section 38 (1) (c) of the Act read together with Rule 23 (4) and (6) of GN. No. 42 of 2007. He supported his argument by the case of **Samora Boniphace & 2 others Vs. Omega Fish Limited** (supra). He strongly argued that, one day interval from the date of issuance of notice to the date of retrenchment cannot objectively suffice the effective consultation process. He therefore insisted that, retrenchment procedures were to be adhered in good faith as provided by the law and a number of cases.

On the nature of the applicants business he submitted that, urgency should not be induced by failure to notify the respondents as soon as retrenchment was contemplated. He stated that since notice was issued to all staff members therefore it is completely absurd to conclude that the business was at risk if the respondents were prior notified of the intended retrenchment.

On the applicant's allegation that the respondent never referred the matter to CMA for mediation as provided under section 38 (2) of the Act, the Learned Counsel submitted that, the respondents were automatically denied of such right due to the fact that they were retrenched on the same day when consultation was done.

The Learned Counsel further submitted that, the Arbitrator was right to consider the circumstances of this case to award the respondents 12 months compensation as provided under Rule 32 (5) of the Labour Institution (Mediation and Arbitrators Guidelines) Rules, 2007 GN. No. 67 of 2007. He argued that, the case of **Matilda Garase Rwebusiga Vs. Blue Rock Spur Ltd.** (supra) cited by the applicant is distinguishable with the present case. In the cited case the employee was transferred to another related Company while in the present application the respondents were terminated without being offered with another position.

On the issue of selection criteria Mr. Lingopola submitted that, the applicants' selection criteria were not clear as provided for under Rule 24 (3) of the Codes. He stated that the relevant provision requires the method of LIFO and FIFO to be applied while the same were not the case in the present application. In conclusion Mr.

Lingopola prayed for the application to be dismissed and CMA's award be upheld.

After going through parties' submissions, Labour laws, CMA and Court records with eyes of caution, I find the issue for determination are, whether the termination of employment on retrenchment was based on a valid reason and stipulated procedures and lastly is 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.

Notification entails to provide the employers concerned or representation in good time with relevant information including the reasons for the termination contemplated, number of workers and the categories likely to be affected and the period over which the retrenchments are intended to be carried out. It also give workers or their representatives as early as possible an opportunity for consultation on measures to be taken to avert or minimize the terminations/retrenchment and the measures to mitigate the adverse

effects of any termination on employees concerned such as finding alternative employments.

About consultation normally provides an opportunity for an exchange of views and establishment of a dialogue which can only be beneficial for both the employer and employees, by protecting employment as far as possible and hence ensuring harmonious labour relations and a social climate which is proportions to the continuation of the employer's activities. Indeed, transparence is a major element in moderating or reducing the social tensions inherent in any termination of employment for economic reasons.

In the matter at hand it is undisputed there is valid reason for retrenchment. According to respondents testimonies before CMA, they said that they were notified on the reason for retrenchment, that being structural and economic reason as indicated in their notices of termination. Hence I find no need to exercise my mind too much to discuss on the substantive aspect of termination since that aspect is undisputed.

On the second limb of fair termination that is the procedural fairness of retrenchment, the legal position is that even if the

employer might have a legitimate reason to retrench employees he/she also have to adhere to mandatory stipulated procedures for retrenchment. In our labour laws procedures for termination on retrenchment/operational requirement are provided under section 38 of the Act read together with Rules 23 and 24 of the Codes and the Guidelines under the Employment and Labour Relations (Code of Good Practice) GN. 42 of 2007, I quote the relevant section of the Act 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**;

(v) severance pay in respect of the retrenchment.

[Emphasis is mine]

The above position was also clarified in the book Titled **Employment Law Guide for Employers** by George Ogembo, 2018 where at page 339 states as follows:-

> "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".

In the matter at hand the applicant submitted that the Arbitrator erred in law by holding that notice was not effective. It is from the records of the Court that, the respondents were notified of the intended retrenchment on 02/07/2018. The said notice clearly stated that respondents' retrenchment took effect from 03/07/2018. However, in such general notice was clearly stated that it shall be construed as the statutory 30 days' notice with effect from the issuing day. And by such notice respondents were invited to consultations. The Arbitrator held that the notice period was too short to facilitate effective consultation. In our labour laws as cited above under section 38 (1) (a) of the Act, it requires to give notice of any intention to retrench as soon as it is contemplated. However, the law did not specifically pointed out number of days required on notice for retrenchment. In my view the purpose of notice is to enable parties to have reasonable time to agree on different terms and explore all measures to avoid retrenchment. A notice should not be taken as an independent procedure from the procedures stipulated above, all procedures have to be adhered communicatively. I am of the view

that type of business and the circumstances that led to the retrenchment are the determination factors of how urgency the process of termination has to be undertaken. Needless to say that, in certain circumstances the law permits the employer to have urgency consultation. Therefore, employers may shorten the notice period. This position is clearly expressed in Rule 23 (7) of the Codes which is to the effect that:-

> "The more urgent the need by the business to respond to the factors giving rise to any contemplated termination of employment, the more truncated the consultation process may be. Urgency may not however, be induced by the failure to commence the process as soon as a reduction of the workforce was likely. On the other hand, the parties who are required to reach agreement shall meet, as soon and as frequently as may be practicable during the process".

Therefore on the basis of the above discussion, is my considered opinion that since the applicant's business was

deteriorating mainly for poor performance of medical books and slow growth of new business and, the applicant had already notified the respondents about having consultation meetings as soon as it was practicable, that was proper process (exhibit D1 - General Notice to all employees on the upcoming retrenchment). And as rightly submitted by the applicant's counsel that the general notice clearly stated that it shall be construed as the statutory 30 days notice with effect from the day it was served on 02/07/2018. Thus, respondents had time to take measures to mitigate the retrenchment within that period of notice if were not satisfied by going to the CMA for mediation as required in law.

The respondents also alleged that they were not consultated. However the record reveals that, the applicant tendered exhibits before CMA to prove that consultation meetings were held, as per exhibit D3 (first consultation minutes) and exhibit D4 (second consultation minutes). Even the respondents' testimonies before CMA during arbitration admitted that, they attended the said consultation meetings.

On the basis of the discussion above, I am of the view that the respondents were consulted. The purpose of consultation meeting as provided by the law is to enable both parties to reach agreement on certain terms as stipulated under rule 23(4) of GN No. 42 of 2007 which provides as follows:-

> "Rule 23 (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 on:-
>
> (a) the reasons for the intended retrenchment (i.e. the need to retrench);
>
> (b) any measures to avoid or minimize the intended retrenchment such as transfer to other jobs, early retirement, voluntary retrenchment packages, lay off etc;
>
> (c) criteria for selecting the employees for termination, such as last-in-first-out (LIFO), subject to the need to retain key

jobs, experience or special skills, affirmative action and qualifications;

(d) the timing of the retrenchment;

(e) severance pay and other conditions on which termination took place; and

(f) steps to avoid the adverse effects of terminations such as time off to seek work.

The respondents argued that they had no time to air out their views.

I have careful examined the meeting minutes, as per exhibit D2 (minutes of retrenchment meeting held on 02/07/2018) is clear the applicant held a meeting with heads of departments and some of the respondents to wit PW2, Nilufar Manalla attended such a meeting and the minutes reveals the employees aired their views. The applicant also held a meeting with all employees, as per exhibit D5 (second retrenchment staff meeting minutes) though the respondents view were not recorded but it is stated that they aired their view and comments. The applicant also advised the respondents that those who were not satisfied with the employer's decision had an

opportunity to appeal and give their reasons as to why the retrenchment decisions should be reviewed. Applicant further invited every individual respondent to his office for clarification or assistance on any matter, however, the respondents had no further claims.

Under the labour laws of the land, it is clear that the employees who are dissatisfied with the retrenchment process can challenge by referring the matter to the CMA for mediation before such process is concluded as pointed above. Thus, is my view that the moment respondents were given notice for retrenchment and consultation concluded of which they were dissatisfied and not agreed too, they ought to have knocked the CMA doors for mediation before signing the retrenchment package as they did as require by the law. This is the position under Section 38 (2) of the Act, which provides that, I quote:-

> "Where in the consultations held in terms of subsection (1) no agreement is reached between the parties, the matter shall be referred to mediation under Part VIII of this Act".

According to the CMA proceedings, among the respondents, to wit PW1 Lucy Tesha, PW5 Cecilia Mwanga testified before CMA that

they were forced to sign the retrenchment packages, but there was no any proof tendered to prove their allegation. Notice of termination was given to the respondents on 03/07/2018; however they did not sign the retrenchment packages on the same date. Not only that but also each employee involved in this matter was given time to make a decision whether he/she accepted the retrenchment packages as testified by DW1 before CMA. I quote his testimony on his verbalism:-

> "Tuliwaita mmoja mmoja na kuwapa barua zao, tuliwaambia kama hawariziki wana option ya rufaa lakini wote walipokea/walisaini isipokuwa mmoja tu ali-appeal na appeal yake ilikubalika wengine waliridhika na mafao".

Loosely translation of the quotation is that each respondent was called separately and, they were informed that if they are dissatisfied of their retrenchment they may appeal. However, only one employee among them appealed and the rest were satisfied with the termination of employment process.

Therefore the respondents were given ample time to make their decision about the notice of retrenchment but they all voluntarily agreed to the retrenchment with the termination benefit

packages according to the notice of retrenchment discussed above. Respondents advanced to the stage of signing termination letter with a disclaimer that they do not have any further claims against the applicant. For easy of understanding and reference let me expose the said disclaimer in one of termination letters. I quote:-

> "I Lucy Tesha do hereby accept receipt this letter and by signing this document I accept the payment as full and final statement of my retirement and terminal benefit payable by Resolution Health Limited. I do not have any further claims for remunerations or arising out of the retrenchment and shall not lodge before a court of law or labour tribunal any claim against the Employer relating to my employment tenure or this retrenchment exercise.
>
> Sgd:
> **Lucy Tesha**
> 06/07/2018".

Under that circumstance I have no hesitation to say that the respondents were properly consultated and agreed to their termination by retrenchment. As discussed above consultation

undertaken in the process no matter how long they took place, they should have resorted to the legal remedy available that is to refer the matter to CMA or mediation. As rightly submitted by the applicant if they were aggrieved on any term offered to them in the notice of their retrenchment and they should have referred the matter to CMA for mediation. Failure to do so impliedly means that they were all satisfied with the whole retrenchment process.

The respondents also alleged that the criteria for selection were not disclosed by the applicant. As cited above under Rule 23 (4) (c) of the Codes the law provides for some of the criteria to be considered on retrenchment. I have careful examined the consultation minute, exhibit D2 (minutes of a retrenchment meeting held on 02/07/2018 at 09:00 hrs) the applicant convened a meeting with heads of department where he informed them on criteria to be considered in giving suggestions of the employees to be retrenched. I quote the relevant minutes for easy of reference:-

> "3. **Next steps considerations by each Head of Department.**
>
> Each HDO was requested to review their departments in the next 24 hours and make

recommendation to Management using the following criteria:-

a. Look at your staff costs and cost structure. Consider cutting your role out if you deem it important.
b. Consider positions to retrench and not individuals in your department.
c. Put a freeze on new hiring or confirming staff on probation".

Therefore, the above were the selection criteria used by the applicant. In the record it is revealed that, the 3rd respondent namely Nilufar Manalla attended such a meeting and was aware of the criteria and being a head of department he had a duty to disclose the applied criteria to his subornate and fellow employees. It is also on record that in a meeting held with all the respondents, the applicant was transparent and insisted that the criteria stipulated by the labour laws will be considered in retrenching the respondents.

On the basis of the above discussion it is crystal clear and I am satisfied that, the applicant complied with all the mandatory procedures for retrenchment as provided by the labour laws of this

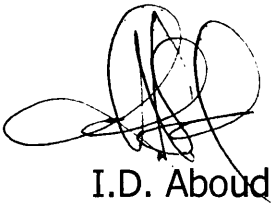
country. The respondents apparently were properly notified, consultated and the selection criteria as well as all relevant information of the said retrenchment process were disclosed by the applicant. As earlier intimated, the respondents also voluntarily agreed to the retrenchment process and if were aggrieved should not have accepted that process and proceed to pocket in the payment of retrenchment packages. Therefore in my opinion the applicant should not be held responsible for the respondents' action in this regard. I do not hesitate to say, the respondents referral of their complaint to CMA against the applicant in this matter was an afterthought and had it been that the above circumstances were considered, the arbitrator would have made a different award.

On the second issue as to parties relief, it is on record that upon their termination on retrenchment the respondents were paid all their statutory terminal benefits which includes accrued salary up to the day of 03/07/2018, outstanding annual leave allowance if any, severance pay of one month basic salary of every year worked with the Company, one month basic salary in lieu of notice, medical insurance up to 31/12/2018 and a certificate of service as evidenced by their notices of retrenchment dated 03/07/2018 as per exhibits P1

(a), P2 (b), P3 (b), P4 (b), P6 (b), P7 (b), P8 (b), P9 (c) admitted at the CMA. Since the termination of respondents' employment for operational requirements was based on valid reason and fair procedures, they are not legally entitled to any compensation stipulated under section 40 of the Act.

In the result I do not hesitate to fault the arbitrator's award that the applicant did not follow the retrenchment fair procedures. Thus, the present application has merit and the arbitrator's award is hereby quashed and set aside.

It is so ordered.



I.D. Aboud

JUDGE

29/05/2020