IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 89 OF 2019

BETWEEN

MOKU SECURITY SERVICES LTD..... APPLICANT

AND

HALIMA FADHILI SWEDI..... 1ST RESPONDENT

SELEMANI MBEGU.....2ND RESPONDENT

JUDGMENT

Date of Last Order 05/10/2020

Date of Judgment 16/10/2020

A. E. MWIPOPO, J

MOKU SECURITY SERVICES LIMITED, the Applicant, filed the present application for revision against the decision of the Commission for Mediation and Arbitration (CMA) at Dar Es Salaam Zone in Labour Dispute No. CMA/DSM/ILA/R.63/18 delivered on 31st January, 2019. The Applicant is praying for the following orders of the Court:-

1. The Court be pleased to call and revise the proceedings and subsequent award of the Commission for Mediation and Arbitration at

Dar Es Salaam in Labour Dispute No. CMA/DSM/ILA/R.63/18 decision made by Hon. Belinda, S., Arbitrator, on 31st January, 2019.

2. That the Court be pleased to revise and set aside the decision of the Arbitrator as it was granted in error and with misconception of law and was improperly procured.
3. Any other relief to be granted as the Court find it fit and just to grant.

The history of the dispute in brief is that the Respondents namely Halima Fadhili Swedi and Selemani Mbegu were employees of the Applicant. The Respondents were employed on different position on different dates and were retrenched on 31st December, 2017. The Respondents were aggrieved by the Applicant's decision referred the dispute to the Commission which delivered the Award in their favour. The Applicant was not satisfied with the Commission decision and he filed the present application.

Both parties in the application were represented. The Applicant was represented by Mr. Isaya Thomas Maiseli, Personal Representative from Association of Tanzania Employers (ATE), whereas the Respondents were represented by Mr. Jackson Mhando, Personal Representative. The Court ordered for the hearing of the submission to proceed by way of written submissions.

The Applicant briefly submitted in support of the application that he was not satisfied with the decision of the Commission for Mediation and Arbitration in the Labour Dispute No. CMA/DSM/ILA/63/18 on 31 January, 2019, on the ground that the Arbitrator erred in law to award the Respondents to be paid total sum of Tshs. 2,720,000/= as the remaining salaries for their contract. All procedure for the retrenchment as per section 38(1) (c) all of the Employment and Labour Relations No. 6 of 2004 were adhered. The Arbitrator in page 7 of the award agreed that the procedure for retrenchment were complied. Even the Respondents admitted in their evidence that they attended the meeting, which means employees were consulted. For that reason, the Applicant prayed for the application to be allowed and the Commission Award be set aside.

The Respondents replied to the Applicant submission that the Respondents employment were for a fixed term contracts of one year. Halima Fadhili Swedi employment contract commenced on 12th December, 2017 and was scheduled to end on 12th November, 2018. Ally Mbegu employment contract commenced on 22nd August, 2016 and was coming to an end on 22nd July, 2018. Both Respondents were terminated unfairly by the Applicant on 01st January, 2018. The Applicant convened the Consultation meeting with the employees on 16th October, 2017 for

retrenchment without the Respondents being represented by member of the Workers Union. This was contrary to the requirement of Section 38 (1) of the Employment of Labour Relation Act No. 6 of 2004. The Applicant did not adhere to the legal procedures. Surprisingly, on 01st January, 2018 while on duty the Respondents received the termination letters form the Applicant which shows that their employment was terminated from 31st December, 2017. The applicant disregarded the fact that Respondents in that time on 1st January, 2018 were still on duty.

The Respondents submitted further that the Applicant testified before the Commission that the retrenchment was due to the economic hardship. But there was no evidence tendered to prove the allegation. The Applicant have a burden to prove the reason for termination was fair means that the termination was not fair by virtue of Section 37 (2) (a) of the Employment and Labour Relation Act, Act No. 6 of 2004. Also, the Applicant's argument based on the procedure for termination which was held by the Arbitrator to be fair. But the same has no merits for the reason that the Applicant skipped the first ground which was whether there was reasonable Cause for termination. The Commission was satisfied that the termination was not fair and Awarded the Respondents to be compensated the remaining months salaries in total amount of TShs. 2,720,000/=. This Compensation is the

same with the legal stand taken by this honorable Court in the case between **JOAKIM MWANIKWA vs. GOLDEN TULIP HOTEL,** the Revision Application No. 268 of 2013, (Unreported), where this Court held that;

> *"When employer terminates a fixed term contract, the loss of the salaries by the employee of the remaining period of the unexpired term is a direct foreseeable and reasonable consequence of the applicants action was loss of salary for the remaining period of the employment contract".*

The Respondent prayed for the application to be dismissed.

The Applicant did not file rejoinder submission.

From submission from both parties, there are three issues to be determined. The issues are as following;

i. Whether reason for termination of Respondents employment by the applicant was fair.
ii. Whether the procedure for retrenchment was fair.
iii. What remedies are entitled to the parties?

The employment and Labour Relations Act, 2004 provides in section 37 (1) and (2) that it shall be unlawful for an employer to terminate the employment of an employee unfairly. The section impose to the employer the duty in dispute for termination of employment to prove that the termination was fair. The termination is unfair if the employer fails to prove

that the reason for termination is valid and fair or/and failure to prove that the procedure for termination was fair. The section reads as follows:-

> **"Section 37 (2) A termination of employment by an employer is unfair if the employer fails to prove-**
>
> **(a) that the reason for the termination is valid;**
>
> **(b) that the reason is a fair reason-**
>
> **(i) related to the employee's conduct, capacity or compatibility; or**
>
> **(ii) based on the operational requirements of the employer, and**
>
> **(c) that the employment was terminated in accordance with a fair procedure."**

In the determination of the first issue whether the reason for termination of Respondents employment was valid and fair, it is a well-established principle of law that once there is issue of unfair termination the duty to prove the reason for termination was valid and fair lies to employer and not otherwise. (see **Amina Ramadhani vs. Staywell Appartment Limited, Revision No. 461 of 2016,** High Court Labour Division, at Dar Es Salaam).

In the present case were the termination was by way of retrenchment, section 37(1)(b)(ii) of the Act is read together with rule 23(2) of the

Employment and Labour Relations {Good of Good Practice} Rules, GN No. 42 of 2007, which provides that the reasons for termination by operation requirement (retrenchment) may be economical needs, or technological needs or structural needs a similar reasons to this one. The evidence available in this application especially the testimony of Swaumu Athumani - DW1 was that the reason for termination was the decrease of the work which I find it to fall under economic needs. When cross examined, the witness testified that she has no proof that there is decrease of the work especially large scale guard works. The Arbitrator held that the Applicant failed to prove that there was decrease of large scale guard work. I agree with the Arbitrator that the Applicant witness failed to prove that the reason for retrenchment which was alleged by the Applicant was valid as she admitted in the cross examination during her testimony that she have no proof that there was a decrease in large scale guard work. Therefore, I find that the Applicant failed to prove the reason for the retrenchment of the Respondent was valid and fair. Therefore, the termination was unfair substantively.

The second issue is whether the procedure for retrenchment was fair. The Applicant submitted that the procedure for termination was adhered as a result the Arbitrator was supposed to hold that termination was fair. In contention, the Respondents submitted that the termination was unfair

substantively as a result procedural fairness does not make the termination to be fair. The Respondents did not submit at all on the issue of fairness of the procedure which I presume that the Respondent admitted that the procedure for termination was fair. The Arbitrator held that the procedure for retrenchment was adhered despite a slight departure from the procedure and not following some of the procedures but the law allows the employer to adhere to basic procedure for termination. I agree with Arbitrator view on this that some procedures especially those which do not cause any injustice to the employee upon agreement may be skipped. As a result, I find that the procedure for termination was adhered as it was held by the Commission.

The last issue is what remedies are entitled to the parties? The arbitrator awarded the Respondents to be paid by the employer total of Tshs. 2,720,000/= being salary compensation for the remaining time of their contract. I agree with the Arbitrator award. It is trite law that **When employer terminates a fixed term contract, the loss of the salaries by the employee of the remaining period of the unexpired term is a direct foreseeable and reasonable consequence of the employer action was loss of salary for the remaining period of the employment contract.** [See. **JOAKIM MWANIKWA vs. GOLDEN TULIP HOTEL,** the Revision Application No. 268 of 2013, (Unreported)].

Therefore, I find that the CMA award was according to the law. As result, I hereby dismissed revision application for want of merits. The CMA award is upheld. Each party to cover its own cost of the suit.

A. E. MWIPOPO
JUDGE
16/10/2020