IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 226 OF 2019

BETWEEN

ABDI KILENGA & 47 OTHERS..... APPLICANTS

AND

NATIONAL POULTRY COMPANY (NAPOCO) ..... 1st RESPONDENT

JAMES MAUGO (RECEIVER MANAGER) ..... 2nd RESPONDENT

THE ATTORNEY GENERAL ..... 3rd RESPONDENT

JUDGMENT

Date of Last Order: 30/09/2020

Date of Judgment: 21/10/2020

A. E. MWIPOPO, J

Aggrieved by the award of Commission for Mediation and Arbitration (CMA) which was delivered on 10th September, 2018, in favour of the Respondents, the Applicants namely Abdi Kilenga and 47 others have filed the present Application for Revision. The Applicants are praying for the following Orders:-

1. That Honourable Court be pleased to call for CMA Arbitration proceeding and the award issued on 10th September, 2018, by Hon. Mpulla, Arbitrator, in Labour Complaint No. CMA/DSM/MIS/49/14/1060, revise and set aside the said award.

2. That, this Court be pleased to make any other order that may meet the good ends of justice.

The application was supported by the affidavit of one Anthony Wilbald Teye, Applicants' Advocate. The Affidavit contains a statement of legal issues in paragraph 13. The legal issues are as following hereunder:-

i. Whether there was a misconduct on the part of the Arbitrator.
ii. Whether the award was improperly procured.
iii. Whether the termination of Applicant's employment is unlawful.
iv. Whether the Applicants were not paid in lieu of notice, severance allowance and other terminal benefits as provided by collective Bargaining Agreement.
v. Whether there was bullying and harassment in the process of terminating the employment of the Applicants.

The brief background of the application is that the Applicants were employees of the National Poultry Company (NAPOCO), 1st Respondent, a

public institution which was owned by the Government. In December, 1998, the Applicants were informed by James Z. Mauggo, Receiver Manager of NAPOCO (2nd Respondent) that they should collect their terminal benefits between 4th and 8th January, 1999, at the office of the Receiver Manager. The Applicants were not satisfied with the terminal benefits paid to them and they referred the dispute to the Commission for Mediation and Arbitration claiming for addition payment to the tune of 361,095,235.14 shillings. The Commission delivered its Award in the favour of the Respondents. The Applicants were aggrieved by the Commission Award and filed this Revision Application.

At the hearing, the Applicants were represented by Mr. Anthony Teye, Advocate, whereas Ms. Careen Masonda, State Attorney, appeared for the Respondents. Following the order of the Court, the matter was disposed of by way of written submissions.

In support of the application, Mr. Anthony Teye, Advocate, submitted on all five legal issues. On first legal issue, Mr. Teye submitted that there was a biasness on the part of arbitrator. The Arbitrator did not consider relevant evidence before him. Exhibit D-2 a letter addressed to the government Parastatal Sector Reform Commission (DSRC) responsible for restructuring Government Parastatals was admitted by the Commission but

it was not considered in procuring the award. The Exhibit D-2 was showing that there was restructuring of the Government Parastatal. The Arbitrator erred to hold that NAPOCO was a father who died interstate. What was paid to the Applicants was either received from Presidential Parastatal Sector Reform (PSRC) or directly from Treasury Registrar based on the requested money by the 2nd Respondent. There was no transparency regarding the amount of Tshs. 25,148,785/=, paid by 2nd Respondent to the Applicants which resulted injustice and unfaithfulness in honouring applicants' payments.

The Counsel for Applicants submitted further that the 2nd Respondent did not explain amount and categories of payment including a month salary paid in lieu of notice, severance pay, leave payment, due wages, transportation allowance and other benefits arising from Voluntary agreement (VA). The 2nd Respondent honored payment of Tsh. 25,148,785/= instead of Tsh. 386,244,020/= as indicated in Exhibit C-3 and C-4. As a result, the amount not paid to the Applicants is Tsh. 361,095,235.14. The arbitrator failed to ascertain the amount claimed and decided to accept the amount paid by the 2nd respondent.

On second legal issue whether the award was improperly procured, it was submitted by the Applicants that the Arbitrator wrongly pronounced

the award by applying new law (Employment and Labour Relations Act, 2004) contrary to section 42 of the Written Laws (Miscellaneous Amendments), (No. 2) of 2010, particularly Rule 13 (1) of the Third schedule thereto. The Applicants disputes originated from the repealed law, thus it ought to have been determine by applying the repealed law as if they have not been repealed. It's undisputed that the Applicants' employment were terminated by the 2nd respondent but he failed to clarify payment of terminal benefits. Also the notice issued by receiver which is Exhibit C-5 is not proper, as it was contrary to Section 31 and 32 of the Employment Ordinance, Cap 366.

The third Applicants legal issue is whether the termination of applicant's employment is unlawful. The Applicants submitted on the issue that they were not issued with an adequate notice of consultation prior to retrenchment as evidenced by Exhibit C-3, C-4 and C-6 which show only four days were given as it was published on 31st December, 1998 and payment was made in 4th and 8th January, 1999. There was no explanation on how much was paid in Lieu of notice.

The fourth Applicants legal issue is whether or not the applicants were fully paid their terminal benefits. The Applicants were of the view that the 2nd Respondent paid only part and not all benefit including severance

allowance in accordance with Section 3 (a) (1) and 5(1) (2) (a) (b) of the repealed Severance Allowance Act Cap 487, 27 months salaries not paid and benefit agreed from Voluntary Agreement (VA) registered by the Industrial Count of Tanzania. The arbitrator having found that the 2nd Respondent had a duty to state the amount to be paid to the Applicants including benefits agreed in a Voluntary Agreement (VA) which had a binding nature, was supposed to make an order for the 2nd and 3rd Respondents to settle and pay the Applicants remaining benefits which were also due according to repealed laws. The Applicants prayed for the CMA award to be revised.

In response to the Applicants submission, Ms. Careen Masonda, State Attorney, submitted that the Arbitrator carefully analyzed all evidence adduced by both sides without any bias or favor to any party. The Arbitrator was trying to acknowledge the existence of Collective bargaining Agreement in the Award but given the circumstance of 1st Respondent financial constraints that payment could not have been done in accordance with a Voluntary Agreement. Therefore on such basis the Arbitrator was not bias and this was clearly stated on his finding at page 9 of the CMA award.

With Regards to payment of 25,148,785/= shillings to the Applicants, the Counsel for Respondents submitted that it was proper and did not cause any injustice or unfaithfulness to the Applicants. The payment of 361,096,235/= shillings is baseless and unfounded as Applicants payment of all their terminal benefits had already been made. As for figures, articulation, clarification and specification of payments made, the same had been provided vide exhibit D2 which the Applicants admits to have received.

It was submitted by the Respondents on the second legal issue that the award was properly procured as the Arbitrator referred to the Employment Ordinance and not Employment and Labour Relations Act, Act No. 6 of 2004. This is seen at page 7 of the award where the Arbitrator has clearly stated that the position in both laws are similar save for the wording used in the repealed law which was redundancy. Had the Arbitrator used the present law the award would still have been properly secured, since it is a position of the law that all disputes arising from the Employment Ordinance shall be determined by using Employment and Labour Relations Act. But, if the disputes are brought or filed at the CMA by a Labour officer, once filed the laws applicable is Employment and Labour Relations Act No 6 of 2004.

This dispute originates before the enactment of the Employment and Labour Relations Act, Act No. 06 of 2004 and the history of disputes shows that the Applicants had once referred their dispute to a Labour Officer. That being the case, the Arbitrator would have been right even by applying the present law still the award would be properly secured. The CMA Form No. 1 shows that the dispute arose on 4th October, 2020, therefore basing on when the dispute occurred the Applicable law is Employment and Labour Relations Act No. 6 of 2004 and repealed laws as stipulated by Applicants' Counsel. The notice referred on page 7 of the Award is a notice on Company debts issued under the Companies Ordinance and not labour laws. There was no way it could meet the standards stated in section 31 and 32 of the Employment Ordinance. There was no requirement of notice needed as the Applicants were given salary in lieu of notice. There was no need of issuance of notice as suggested by applicants' counsel. Therefore the Award was properly procured.

On third legal issue, it was submitted by the Respondents that termination of employment was lawful and in accordance with Section 31 of the Employment Ordinance, Cap. 366, as amended by Employment ordinance (Amendment) Act 1962. The Amended section provides for payment of a month salary instead of notice. The Applicants were not

issued with a notice because they were paid salary in lieu of notice as seen in the letter dated 12th August, 1999 under Item i of the letter. Therefore the termination was lawful as it was substantively and procedurally fair.

On fourth legal issue, the Respondents submitted that the Employment Ordinance has no any provision that provides for clarification of the payment of terminal benefits once the employment is terminated. But, what is provided in case of termination is that the employee is entitled to be paid salaries (in case there is no notice of termination), wages and other terminal benefits. Contrary to this application the Applicants were paid all terminal benefits and explanation regarding all terminal benefits were given vide a letter dated 12th August, 1999.

The Respondents submitted further that the payment of terminal benefits could not be done in accordance to the voluntary agreement due to financial constraints of the Company which had to be sold in order to settle the company's liabilities including payment of its employees. It was impossible to comply with the agreement as the company was closed and underwent liquidation. The Arbitrator could not order the 2nd and 3rd Respondents or the Treasury Registrar to pay the Applicants as the debts had already been discharged by the 2nd Respondent.

Regarding the issue of temporary injunction, Ms. Masonda submitted that the Applicants were not parties to the case and have failed to show proof that they were parties therein. Thus, the order should not be relied upon as it does not concern them. The Counsel for the Respondents prayed for dismissal of the application.

In rejoinder the applicants retaliated the submission in chief and insisted that there was no clarification of payment of Applicants terminal benefits.

After a thorough perusal of parties' submission, there are three issues for determination in this application. The issues are as follows;

a) Whether the arbitration Award was properly procured by the Arbitrator.
b) Whether the termination of the Applicants employment was lawful.
c) Whether the Applicants were paid terminal benefits according to the law.

Starting with the first issue, the relevant provision on proper procurement of the Commission Award is Rule 22(2) of Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N No. 67 of 2004. The

section provides for five stages of the arbitration process which involve introduction, opening statement and narrowing of issue, evidence, argument and award. The Arbitrator is required to adhere these five stages during arbitration process.

The Applicants have submitted that the Commission Award was improperly procured for the reason that there was a biasness on the part of arbitrator who did not consider relevant evidence before him. The Arbitrator erred to hold that NAPOCO is a father who died interstate while what was paid to the Applicants was either received from Presidential Parastatal Sector Reform (PSRC) or directly from Treasury Registrar based on the requested money by the 2nd Respondent. The 2nd Respondent did not explain amount and categories of payment including a month salary in lieu of notice, severance allowance, leave pay, due wages, transportation allowance and other benefits arising from Voluntary agreement (VA). In contention, the Respondents submitted that the Arbitrator carefully analyzed all evidence adduced by both sides without any bias or favor to any party. The payment of Applicants terminal benefits had been provided vide exhibit D2 which the Applicants admits to have received.

The evidence available in record shows that the Arbitrator adhered to all stages of the arbitration process. Further, the Award contains details of

the parties, issues in dispute, background of the dispute, summary of evidence and arguments, reasons for decision, orders and Arbitrator's signature as provided under Rule 27(1) and (3) of the G.N. No. 67 of 2007. Further, there is no evidence whatsoever to prove that there was biasness in the Commission Award. The trial Arbitrator was of the view that since the 1st Respondent was under receivership then he was not in position to pay for the benefits in the Collective Agreement. The reasoning in the award was based on the evidence available in record. Thus, I find that the Commission Award was properly procured.

Regarding the second issue, it is not in dispute that the Applicants employer (1st Respondent) was declared bankrupt which means he was broke economically. The Applicants admitted in their testimony that they were terminated from employment. The only issue in dispute is as to when Applicants were terminated and if the termination was done according to the law. According to the testimony of Patrick Yegela - DW1, the Applicants were terminated on 25th October, 1996, by payment of one month salary in lieu of notice of termination which the Applicants rejected. And due to the presence of Civil Case No. 282 of 1995, which was struck out by the Court on 9th May, 1997, the Applicants were paid their terminal benefits including a month salary in lieu of notice on January, 1999. However, there is no

evidence which prove that the Applicants were terminated on 25th October, 1996.

The Arbitrator was of the opinion that since the 1st Respondent was under receivership due to financial constraints, the date when the 2nd Respondent was appointed official Receiver Manager of the 1st Respondent automatically the Applicants were terminated. I have different opinion. Despite the presence of valid reason for termination which is financial constraints leading to insolvency of the company, the termination was supposed to be done in accordance with the law even during receivership.

Section 32 of Employment Ordinance Cap. 366, as Amended, provides that the employer may termination employee's employment contract by payment to the employee a month salary in lieu of the notice. In the present application, the only evidence available which shows as to when the Applicants employment was terminated is the payment of terminal benefits which includes a month salary in lieu of notice. The said terminal benefits were paid to the Applicants between 4th and 8th January, 1999. As a result, I find that the termination of Applicants employment was from the date when the payment of a month salary in lieu of notice was paid to the Applicants which is on 8th January, 1999. Therefore, the

Applicants were properly terminated from 8th January, 1999, when they were paid a month salary in lieu of notice.

The last question to be determined is whether the Applicants were paid terminal benefits according to the law. The evidence available in record shows that the terminal benefits paid to the Applicants includes salary in lieu of notice, transport cost for luggage and bus fare, payment for annual leave and Parastatal Pension Fund (PPF). The handshake payment were not made due to scarcity of funds on the Company. I am of the opinion that the benefits paid to the Applicants were according to law, save only for salary arrears which were not paid to the Applicants. I agree with the Arbitrator that the handshake payment which is provided in collective Agreement entered between the 1st Respondent management and the Trade Union on behalf of the Applicants could not be paid since the 1st Respondent was bankrupt to the extent that even the terminal benefits has to be paid by the Government. The Collective Agreement entered between the 1st Respondent and Trade Union could not bind the Government who is not a party to the Agreement.

Regarding the salary arrears, since the termination of Applicants employment was properly done on 8th January, 1999, when a month salary was paid in lieu of notice of termination, then the Applicants were

supposed to be paid their salary from 26th October, 1996 to 8th January, 1999, which is salary for 26 months and two weeks not paid to them. I have read the Memorandum of Understanding and the Sale of Asset Agreement between the Government and M/S Singu Farm Limited for the sale of Assets of National Poultry Farm Company Limited (1st respondent) which provides in paragraph 9 and 13 respectively that the retrenchment of employees working in the 1st Respondent three units (the applicants) shall be met by the Government. Therefore, I order for the Applicants to be paid by Government through Treasury Registrar a total of 26 months and two weeks' salary being salary arrears not paid to the Applicants before termination. The salary has to be calculated on the last salary amount paid to the Applicants prior to their termination.

Therefore, the application for revision is allowed as discussed herein and the CMA Award is hereby set aside. Each party to carry its own cost of the suit.

A. E. MWIPOPO
JUDGE
21/10/2020