IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 588 OF 2018

BETWEEN

JANETH MSHIU.....APPLICANT

VERSUS

PRECISION AIR SERVICES LIMITED.....RESPONDENT

JUDGEMENT

Date of Last Order: 27/10/2020
Date of Judgement: 30/10/2020

Aboud, J.

The application was made under the provision of section 91 (1) (a) (b), 91 (2) (b) (c) and section 94 (1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004 (here forth The Act), Rule 24 (1) 24 (2) (a) (b) (c) (d) (e) and (f), Rule 24 (3) (a) (b) (c) (d) and 28 (1) (d) (e) of the Labour Court Rules GN No. 106 of 2007 (herein The Rules) and any other enabling provision of law.

The applicant moved the Court on the following orders:-

i. That the Honourable Court be pleased to call for the records of the proceedings and the decision thereof in the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/KIN/ILA/R.1156/17/30, revise and set aside the decision delivered on 24th May, 2019 by Hon. Mbena, arbitrator.

ii. That the Honourable Court be pleased to make any other order as it may deem fit.

Briefly are facts led to this application: The applicant was employed by the respondent on 19/02/2000, as a record officer and she was promoted up to a cabin crew. She worked with the respondent until 28/9/2017 when she was terminated on ground of operational requirement while at maternity leave. Being aggrieved with the termination, the applicant filed her complaint before the Commission for Mediation and Arbitration (here in the CMA), that the award was not in her favour. She again decided to pursue her case and knocked the door of this court, hence this application.

The application was supported by the affidavit of Godfrey Bernard Namoto, the applicant's advocate. In opposing the application, the respondent filed a counter affidavit of Migire Migire, advocate.

With leave of the court, hearing was conducted by way of written submission, both parties complied with the schedule. The parties were represented. Advocates from M/S Mchengerwa M & Co. Advocates represented the Applicant while Advocates Migire Migire was for the respondent.

Arguing in support of the application, the applicant's counsel submitted that, applicant's termination was both substantively and procedurally unfair. The applicant failed to comply with the requirement of the law on retrenchment as provided under Section 38(1) of the Employment and Labour Relations Act, Cap 366 RE 2019(herein the Act) as summarized in the case of **NUMET vs. North Mara Gold Mine Ltd,** Rev.No.6/2015. That there was no notice of retrenchment issued to the applicant and other employees as required by the law, The applicant Counsel further submitted that the said notice (Exhibit PA2) dated 2nd June, 2017 as referred by DW2 was not of retrenchment therefore it cannot

stand as a notice for the same, referring the case of **Tanzanite One mining Ltd vs. Maysara Said**, Rev. No.35/2013,LCCD 2013.

In regard to consultation, it was submitted that the applicant was never consulted prior the retrenchment exercise. That it is on record the applicant was a member of COTWU a trade union recognized by the respondent, the said trade union was neither notified nor consulted by the respondent on retrenchment. The applicant Counsel argued that the only proof relied by DW2 was the exhibit PA2 which reads "Internal memo", and cannot be said to have been an official letter addressed to the trade union. He said, since there is no proof that the same was received by a trade union, it just remain to be for the internal purposes only.

It was further submitted that even the minutes of the said first consultative meeting held on 23rd June, 2017 which were admitted as exhibit PA4, on the 3rd paragraph item (iii) reads:-

> "This is not a retrenchment meeting, however whether a retrenchment would be done or not,

would depend on the outcome of this meeting and other subsequent meetings to follow."

It was contended that even Salim Ahmed and Jerry Ngewe did not attend the meetings as representatives of trade union as stated by DW1, but attended in the capacity of the respondents employees as can be noted from the minutes of the meeting(Exhibits PA4 and PA6). That, even PW3 COTWU secretary at the respondent's branch testified that they were called and participated in the meetings as employees. The applicant counsel further argued that, trade union was not invited and they had no any meeting with the respondent. The applicant referred the case of **Singita Grumet Reserves Ltd v Pius Edward Burito**, Rev. No. 31/2012.

Substantively, it was contended that the respondent had no valid reason for retrenchment as the reason of operational requirement is not valid. That the purported retrenchment began on June 2017 up to 30th September, 2017. Which is the period when the respondent conducted evaluation and prepared financial reports which were used to justify the reasons of retrenchment. It was submitted further that, the reason used by

the respondent to terminate the applicant was an afterthought and pretext. He supported her arguments by citing the case of **Samora Boniphace & 2 Others v Omega Fish** Ltd, Rev. No. 56/2012.

The applicant's counsel argued further that, the arbitrator failed to analyze the evidence on record and arrived to a finding that the applicant was not on maternity leave despite of the evidence tendered. He submitted that according to exhibit JM4 the applicant was admitted at Msasani Peninsula Hospital on 10th July, 2017. That the provision of Section 41(4) (a) of the Act, prohibits the employer to issue notice of termination while on leave taken under the same Act.

It was also submitted that, the arbitrator in composing the award failed to analyze and evaluate the evidence and relied on weak evidence of the respondent. That the arbitrator ought to have applied evidence adduced by the parties in each and every issue in order to arrive to a correct and just decision. Finally the applicant Counsel prayed for this court to allow the application and grant her the relief of 12 months' remuneration and general damages to a tune of 200,000,000/=. The

learned Counsel supported his prayer by the case of **Tanzania Breweries Limited vs. Nancy Morenje,** Rev. NO. 182/2015 LCCD I [2015].

In reply, the respondent's counsel did not submitted in reply to the applicant's grounds for revision. The learned Counsel submitted on what transpired on the preliminary Objection raised during arbitration proceedings in regard to the unqualified applicant's representative before CMA. He thus prayed for dismissal of the application for being emanating from the illegal mediation and arbitration proceedings, citing the case of **Edson Osward Mbogoro v Emmanuel John Nchimbi and the Attorney General**, Civil Appeal, No. 140/2006.

In rejoinder, the applicant's counsel submitted that preliminary objection was raised before CMA and the arbitrator determined the same and ordered that arbitration shall start afresh on the reasons that it was not the CMA's intention to make the applicant suffer for the mistakes committed by an unqualified advocate.

After careful consideration of the parties submissions, records and relevant laws, here are the issues for determination:

i. Whether the applicant had valid reason for retrenchment

ii. Whether the procedure for retrenchment were adhered

iii. What Reliefs parties are entitled to.

Before addressing the issues for determination, I find it useful to address on the respondent's concern. As stated by the applicant, it is on record that the said objection was determined by the arbitrator on 21/9/2018. The arbitrator nullified all the proceedings from 8/2/2018 for being illegal.

I have gone through the CMA records and find that hearing of the arbitration commenced afresh on 1/10/2018. Therefore the respondent's allegations have no legal basis. I thus proceed to determine the matter on merit.

In regard to the 1st issue for determination, Section 4 of Cap 366 RE 2019 defines retrenchment as requirements based on the economic, technological, structural or similar needs of the employer. It is also referred as termination on operational requirements. For a retrenchment exercise to

be substantively and procedurally fair, the employer has to comply with the provisions of Section 38 of Cap 366 RE 2019 which reads together with Rule 23 of the Employment and Labour Relations (Code of Good Practice) GN 42/2007 (herein GN 42/2007).

Section 38 of Cap 366 RE 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].

Again Rule 23 of Employment and Labour Relation (Code f Good Practice) GN 42/2007(herein GN.42) which 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 affected.

(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].

In the matter at hand it is the applicant's contention that the applicant had no valid reason for retrenchment because the purported retrenchment began on June 2017 up to 30th September, 2017. That is the period when the respondent conducted evaluation and prepared financial reports which were used to justify the reasons of retrenchment. Therefore the reason used by the respondent to terminate the applicant was an afterthought and pretext.

From records DW1 testified that from 2012 the financial status of the company started to deteriorate, due to the economic reasons especially on airline industry. The running costs were higher than sales hence they ended up cancelling some of the roots to Nigeria and South Africa. The situation continued until 2017 when they did evaluation on productivity and the financial status of the company (Exhibit PA1 which indicated that for a period of six (6) months the Company incurred a loss of 292 Million. As a

result they only managed to meet only direct costs hence they decided to retrench some of the employees since they had few flights operating.

The applicant never disputed that the respondent cancelled some of the flight roots due to economic crisis. Therefore, the fact that the respondent have not tendered any documents showing the economic crisis occurred before they conducted evaluation in June 2017, it does not mean that were not in economic crisis. Exhibit PA1 clearly indicates that the respondent was operating under loss. In the case of **Hendry vs. Adcock Ingram** (1988) 19 ILJ 85 (LC) at 92 B-C the Labour Court of South Africa held that:-

> "When judging and evaluating an employer's decision to retrench an employee, the court must be cautious not to interfere to the legitimate business decision taken by employers who entitled to restructure".

Therefore on that basis, this court is of the view that the respondent had valid reason for retrenchment. I thus find no need to fault the arbitrator's finding on substantive part.

On the 2nd issue as to procedures for retrenchment, the same are provided for under 38 the Act read together with Rule 23 (4) of GN.42/2007 which provides for the purpose of consultation. This 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.

It was the CMA's finding that the respondent complied with the procedure for retrenchment and the applicant was represented through the trade union. The applicant contended that the respondent failed to comply with the procedure for retrenchment as required by the law for failure to notify and consult her since the trade union (COTWU) in which she was a member was neither notified nor consulted.

I have cautiously gone through the records and find that, on 2/6/2017 the respondent issued notice on restructuring (Exhibit PA2). The content of the said notice provided that as a result of restructuring some of

the employees will be redundant and the respondent will smoothly share the details with the affected employees. On 16th June, 2017 the respondent issued notice for consultative meeting to all employees and COTWU, as per exhibit PA3, the meeting was supposed to be held on 23/6/2017. The 1st consultative meeting was held as scheduled and therein the parties agreed to choose their representative for attending consultation meeting as it is easily noted under Exhibit PA4- the minutes of the 1st consultative meeting. From records thereafter they conducted other consultations meetings as noted through exhibit PA6 and PA8.

On basis of the above, this court is of the view that; notice for consultations meeting was issued to the trade union recognized by the respondent COTWU and the same was proved by PW3 in reply to the re-examination questions, I reproduce the same for easy reference;

> "Chama haikushirikishwa kwenye majadiliano yoyote na kampuni kuhusu retrenchment, na hii sio mara ya kwanza ila walitoa notisi kuwa kuna retrenchment barua ilienda makao makuu sisi

walitupa kopi ila hatukusikia chochote kilichoendelea."

So long as the notice was issued to COTWU as per exhibit PA3 and the COTWU branch representative attended the meetings though signed the minutes on the employee's capacity, that implies the respondent had executed the requirement of the law on issuance of notice and consultation, consequently the applicant was duly represented by the trade union.

It is also my view that, under normal circumstances if the respondent have contemplated the retrenchment on the stated reasons, they could have not stopped the same just because the applicant was on her maternity leave. I thus find that the procedure for retrenchment were dully conducted by the applicant hence no need to fault the arbitrators finding.

In regard to the reliefs of the parties, since it is also the finding of this court that the termination was both substantively and procedurally fair, the applicant is only entitled to the retrenchment package, of which I will not interfere with the arbitrator's award for the same.

In the result, I find the application has no merit and I hereby dismiss it.

It is so ordered.

I.D. Aboud
JUDGE
30/10/2020