IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED REVISIONS NOS. 108 & 115 OF 2019

EFROD NGONGA & 4 OTHERS..... APPLICANTS

VERSUS

PRECISION AIR SERVICES..... RESPONDENT

JUDGMENT

11th September & 30th October, 2020

BANZI, J.:

The Applicants, Efrod Ngonga, Geofrey Kapange, Shamsi Kaizirege, Edgar Matilya and Joseph James were employed by the Respondent on different dates and in different positions on a fixed term contract of five years with an option for both parties, upon agreement to renew. In May, 2016, they were terminated from their employment on a ground of retrenchment. Aggrieved with their termination, each Applicant separately referred the dispute for unfair termination to the Commission for Mediation and Arbitration ("CMA") at Dar es Salaam. At the CMA, their disputes were consolidated as complaint number CMA/DSM/ILA/R.567/16/796. After hearing both sides, on 29th June 2018, the Arbitrator dismissed the complaint and decided in favour of the Respondent.

Dissatisfied with the award, the Applicants filed separate revisions before this Court, to wit: No. 108 of 2019 by Joseph James and No. 115 of

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2019 by Efrod Ngonga, Geofrey Kapange, Shamsi Kaizegere and Daud Matilya. For convenience, the revisions were consolidated and heard as one. During the hearing, the Applicants enjoyed the services of Messrs. Boaz Moses and Lucas Nyagawa, learned counsel, whereas, learned counsel Mr. Migire Migire and Ms Juliana Kaswamila, appeared for the Respondent.

Initially, the Applicants raised a total of seven grounds but after abandoned some, they remained with four grounds which are reproduced as hereunder;

1. *That the Honourable Arbitrator erred in law and fact by holding that retrenchment of the Applicant was fair in terms of substance as well as procedural while there was no evidential/scintilla proof that the notice as to retrenchment was duly communicated to the Applicant(s).*
2. *That the Honourable Arbitrator erred in law and fact by relying to unexeisted (sic) document which was stated in the award as exhibit "D5". Such document was never tendered at the time of hearing of the matter hence a bit surprise to the Applicant. Also Hon. Trial Arbitrator relied on the rejected document tendered by the Respondent with the heading "News bulletin" issued monthly.*
3. *That the Honourable Arbitrator erred in law for her failure to disclose all names of the Complainants in the award instead its only one name of Complainant appears. Such omission renders the award null and void.*

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4. *That the award is null and void for naming the Respondent as "Precision Air Services" instead of "Precision Air Services Plc" as appears in the proceedings since inception of the matter at CMA. Therefore such omission invalidates the award as under the law "Precision Air services" and "Precision Air Services Plc" are different legal persons.*

After a thorough scrutiny of grounds for revision in the light of the proceedings and the award of the CMA, I find it prudent to begin with the second ground which in the view of this Court, suffices to dispose of the revision.

It was the contention of the Applicants that, the Arbitrator relied her decision on the rejected and non-existed evidence. Expounding further, counsel for the Applicants submitted that, in the award, the Arbitrator misdirected herself by stating that the notice of retrenchment was communicated to the Applicants via news bulletin while there was no proof of such notice as the document in question was rejected by the same Arbitrator. They also contended that, the Arbitrator relied on exhibit D5 which was never tendered by either party to the dispute. According to them, admitted exhibits were; Exhibit D1, Annual Report and Financial Statement 2015/2016; Exhibit D2, correspondences between the Applicants and the Respondents dated 18th March, 2016 and 17th May, 2016; Exhibit D3, Letters from Respondent to Applicants and Exhibit D4, Applicants' employment contracts. But to their surprise, at page 6 and 10 of the award, there is unknown document named as Exhibit D5 which was never tendered and

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consented by parties to be used as exhibit. This act denied the Applicants right to cross-examine the Respondent on that document. Hence it prejudiced the Applicants and resulted into miscarriage of justice.

In reply, counsel for the Respondent did not submit much on the ground concerning the Arbitrator to rely on rejected evidence and non-existed document, exhibit D5. According to him, the Arbitrator at page 11 of the award highlighted that, the Applicants did not dispute about receiving the notice of retrenchment or consultation which was conducted in the process. In that regard, they prayed for revision to be dismissed.

I have carefully considered the submission by counsel of both sides. According to rule 27 (3) of the Labour Institutions (Mediation and Arbitration Guidelines) Rule, GN No. 67 of 2007, the award shall contain among other things evidence of parties. That is to say, the award must contain evidence adduced by parties in the course of hearing. The contention on the Applicants is that, the Arbitrator relied on exhibit D5 which was never tendered during the hearing.

It is well known that; evidence may be testimonial (oral) or documentary. In the matter at hand, both the Respondent and Applicants adduced oral evidence and produced documentary evidence. As correctly submitted by counsel for the Applicants, documentary exhibits that were tendered and admitted at the hearing are as follows; Exhibit D1, Annual Report and Financial Statement 2015/2016; Exhibit D2, correspondences between the Applicants and the Respondents dated 18th March, 2016 and 17th May, 2016; Exhibit D3, Letters from Respondent to Applicants and

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Exhibit D4, Applicants' employment contracts. It is undisputed that, exhibit D5 was admitted in the award instead of during the hearing. It is reflected at page 17 of the typed proceedings that, the counsel of the Applicants objected admissibility of minutes of meeting held on 25th April 2016 at 12:20 pm because it was not original. After being objected, the Arbitrator stated as follows and I quote;

> *"Tume: Uamuzi wa document ya tarehe 25/4/2016 saa 12:20 pm utaamuliwa mwishoni."*

From the passage above, the said document was neither admitted nor rejected at that stage as required by rules of admissibility of evidence. However, at page 3 of the award the Arbitrator stated as follows and I quote;

> *"...DW1 alitoa nyaraka nyingine ya kikao cha terehe 25/04/2016 kilichohusisha wafanyakazi wa idara ya "engineering" kitumike kama kielelezo ambapo upande wa walalamikaji ulipinga nyaraka isipokelewe kwakuwa haikuwa halisi "original". Hata hivyo kwakuwa nyaraka hiyo ina Saini za walalamikaji na katika ushahidi wa walalamikaji PW1 alikiri kuhudhuria kikao hicho na kuweka saini yake Tume inapokea nyaraka hiyo kama KIELELEZO D5."*

It is apparent from the extract that, the Arbitrator admitted exhibit in the course of delivery of the award instead of admitting the same at the stage of hearing. It is well known that, evidence may be admitted or rejected at the stage of hearing but reason for such decision, may be reserved and given in the course of delivery of the award/judgment. What the Arbitrator did is against the rules of admissibility of evidence and it deprived the

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Applicants their right to cross examine DW1 over that document. Hence, they were denied their right to be heard. Adding salt to the fresh wound, at pages 10 and 11 of the award, the Arbitrator relied on that document in determining the second issue about fairness of the procedure. In addition, the Arbitrator at page 10 of the award, relied on the rejected evidence (news bulletin issued monthly) in establishing about the notice of retrenchment issued to the Applicants. This also tainted the award as the said document was rejected during the hearing.

Since the Applicants were denied their right to be heard, it renders the proceedings and the award a nullity. For that reason, the application for revision is granted. The proceedings of the CMA are hereby nullified and the subsequent award is quashed and set aside. The dispute to be re-tried by a different Arbitrator with competent jurisdiction.

It is so ordered.

I. K. BANZI
JUDGE
30/10/2020

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