IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 04 OF 2019

BETWEEN

EAST COAST OILS & FATS LTD.................................... APPLICANT

VERSUS

GRACE LEONARD SHIRIMA................................ 1ST RESPONDENT

FATUMA KISANGA...2ND RESPONDENT

JUDGMENT

Date of Last Order 28/09/2020

Date of Judgment 30/10/2020

A.E. MWIPOPO, J

This Revision application arise from the decision of Hon. Batenga, Arbitrator, delivered on 30th November, 2018, in labour dispute no. CMA/DSM/TEM/304/2017/148/17. The Applicant namely **EAST COAST OILS & FATS LTD** have lodged the present praying for the following orders:-

1. That this Court be pleased to call for records of the Commission for Mediation and Arbitration in the proceedings of the original labour dispute no. CMA/DSM/TEM/2017/148/17 between Grace Leonard

Shirima & Fatuma Kisanga versus East Coast Oils & Fats Ltd, which its award was delivered before Hon. Batenga, Arbitrator on 30th November, 2018, revise the proceedings and award thereof, quashing and setting aside thereof.

2. That the Court be pleased to grant such other reliefs or orders in favour of the Applicant as it may deem fit and just to grant.

The application which is accompanied by the Chamber Summons is supported by the affidavit of Hassan Dewji, Principal Officer of the Applicant. The affidavit contains two legal issues arising from material facts in paragraph 4. The legal issues are as follows:-

i. Whether it is statutory duty of the employer to ensure that a recognized trade union, upon being served with the notice on intention to retrench, followed by invitation to 1st and 2nd consultation meetings, has ensure that all workers are informed of the said intention.

ii. Whether it is statutory duty to the employer to establish membership of its workers of the recognized trade union at a place of work.

Both parties in the present application were represented. Mr. Adam Mwambene, Advocate, appeared for the Applicant, whereas Mr. Michael

Mgombozi, Personal Representative, represented the Respondents. The Court ordered for the hearing of the application to proceed by way of written submissions.

The Respondents were employed by the Applicant on divers' dates on January, 2016 as house keeper (Cleaner). They were terminated from employment by way of retrenchment on 16th May, 2017. Aggrieved by the termination, the Respondents referred the dispute to the CMA which delivered the award in their favour. The Applicant was not happy with the Commission award and he preferred the present Application for Revision.

Mr. Adam Mwambene, Advocate, submitted on the first ground of the revision that the Arbitrator misdirected herself by not appreciating the fact that after serving the notice of intention to retrench to TUICO as the recognized trade union, the Applicant had no statutory duty to ensure that the recognized trade union holds meetings with all the employees to let them to be aware of what was discussed in the consultation meeting. Section 38 (1) (d) (i) of the Employment and Labour Relations Act, 2004 provides that in any termination for operational requirement (retrenchment) the employer shall comply with the principle that the employer shall give notice, make disclosure and consult in terms with any trade union recognized under section 67.

Section 67 of the Act provides for a registered trade union that represents the majority of the employees in an appropriate bargaining unit shall be entitled to be recognized as the exclusive bargaining agent of the employees in that unit. In the Applicant workplace there is only one trade union which is TUICO and the Applicant did by written Notice of intention to retrench dated 2nd May, 2017, inform and involve the TUICO Regional Secretary, Temeke Region of the implementation of retrenchment process. A copy thereof was served to the trade union unit branch Chairman with copies to all head of department and in the notice board. Thus, it was the duty of the trade union and individual employees to deliver and access the availed information.

The Applicant counsel argued that the Arbitrator held that TUICO had statutory duty as recognized trade union to inform the employees whatever was discussed and agreed upon in consultation meeting in terms with section 67 (1) of the Employment and Labour Relations Act. However, Arbitrator contradicted herself by concluding that the statutory duty was a point of facts which needed to be proved. To support the position, the Applicant cited cases of **Rashid Benjamin and 6 Others vs. Trancargo Ltd**, Revision No. 59 of 2011, [2011-2012] LCCD, case no. 92 at page 186;

and **Singita Grumet Reserves Ltd vs. Pius Edward Burito**, Revision No. 31 of 2012, [2013] LCCD no. 148 at page 260.

As regard to the second ground of revision, the Applicant submitted that the Arbitrator erred to hold that the Applicant failed to prove the Respondent were TUICO members and that if were not members to prove that they were duly informed of the intention to retrench. The Applicant proved that the Respondent were among the TUICO members who became beneficiaries of the Collective Bargaining Agreement (CBA) made between the Applicant and the recognized trade union. Out of the CBA the employees including the Respondents enjoyed TUICO representation as the bargaining unit. Despite these facts, the Arbitrator denied to accept that the Respondents were TUICO members even where the Respondents' monthly salary were deducted 2% membership fees and there was no complaint on such deductions. Thus, the Respondents were duly represented by TUICO being recognized trade union in the retrenchment process leading to the termination of their employment contract. The Applicant prayed for the CMA award be revised, quashed and set aside.

In reply, the Respondents submitted on each ground of the revision as submitted by the Applicant. Regarding the first ground of revision, the Respondents argued that the evidence available in record failed to prove that

the representative trade union has properly consulted its members. The rationale behind this rule is to ensure that all employees are being aware of the ongoing negotiations and agreed on critical issues in the process. The omission of the Applicant as employer to ascertain that the respective Union had properly consulted its members is fatal and vitiated the whole process of termination by retrenchment. The Respondent cited in support of the argument the case of **Singita Grumet Reserve Ltd vs. Pius Edward Burito,** Revision No. 31 of 2012, High Court Labour Division, at Musoma, (Unreported).

In respect of the Applicant's second ground of revision, the Respondents submitted that under section 38 of the Employment and Labour Relations Act, 2004, the employer has obligation both procedurally and substantively to consult with trade unions in the workplace or the employees individually who are not represented by trade union before retrenchment process. The employer further has duty to prove that the termination was fair under section 37(2) and 39 of the Act. The evidence available in the record does not prove that the procedure for termination was fair. Under section 38(1) (d)(iii) of the Act the Applicant had duty to consult individually with employees who are not members of TUICO which is recognized trade union in the Applicant workplace. The Applicant failed to prove that

Respondents were members of TUICO by producing form known as TUF 15 which was supposed to be filled and signed by employees authorizing the employer to deduct trade union dues to a registered trade union which the employee has joined as member. The Applicant also did not produce any evidence to prove that the Respondents were among employees whom their wages were deducted by employer to pay trade union dues.

The Respondent submitted further that agreements that compels an employee to be member of trade union is not enforceable under section 72(1) of the Act. The Collective Bargaining Agreement provides clearly that 2% deduction is to both members and non-members of the TUICO. Further, there is evidence to prove that the Respondents testified before the Commission that they complained about deduction of 2% of their wages to pay trade union dues while they were not its members. The testimony was never challenged by the Applicant. The Respondents prayed for the Court to dismiss the application for lack of merits.

In rejoinder, the Applicant retaliated his submission in chief and emphasized that the Court in the same case of **Singita Grumet Reserves Ltd vs. Pius Edward Burito, (Supra)**, held that in a fair retrenchment process, an employer does not need to consult with individual employees in a workplace where there is a union recognized in term of section 67 of the

Act. In such a situation, the union is assumed to work for benefits of its members, which is the essence of application of the principle of collective powers of labour. This position is in conformity with provision of section 38(1) of the Act which is different from the same court position that before signing a retrenchment agreement the employer has duty to ascertain that a representative union has properly consulted its members.

From the submissions, it is clear that both parties did not submit on the fairness of the reason for termination. This means that the only issue in dispute in this application is on the procedure for termination. The Employment and Labour Relations Act, 2004, provides in section 37 (2) (c) that the termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with a fair procedure. The Act further provides for termination based on operational requirements (retrenchment) in section 38. Section 38 (1) of the Act reads as follows, I quote:

> 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 minimise 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 recognised in terms of section 67;

(ii) any registered trade union with members in the workplace not represented by a recognised trade union;

(iii) any employees not represented by a recognised or registered trade union.

From above provision, in termination for operational requirement the employer is required to comply with four mandatory principles which includes giving notice of any intention to retrench; disclose all relevant information on the intended retrenchment; consult prior to retrenchment; and to give the notice of retrenchment. The section is read together with rule 23 (1), (2), (3), (4), (5), (6) an (7) of the Employment and Labour Relations (Code of Good Conduct) Rules, G .N. No. 42 of 2007 which provides for the requirement of the law on the operational retrenchment of the employee by employer.

The dispute between parties herein is on the procedure for consultation where by the Applicant submitted that an employer does not need to consult with individual employees in a workplace where there is a recognised trade union recognized. While the Respondents supported Commission's position that before signing of retrenchment agreement the employer has duty to ascertain that a representative union has properly consulted its members.

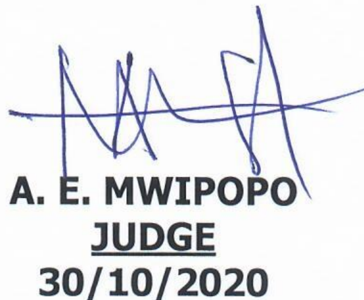
The evidence available show that the Applicant did by written Notice of intention to retrench dated 2nd May, 2017, - Exhibit C1 to inform and involve the TUICO Regional Secretary, Temeke Region of the implementation of retrenchment process. A copy thereof was served to the trade union unit branch Chairman, all head of department and in the notice board. In the Applicant workplace there is only one trade union which is TUICO. The Applicant held two consultation meeting with the TUICO on 8th May, 2017 and on 11th May, 2017.Thereafter the retrenchment agreement was signed on 11th May, 2017 and on 16th May, 2017, employees including the Respondents received termination letter (retrenchment letter). The Minutes of consultation meeting held on 8th May, 2017 – Exhibit C2 shows that after the employees representatives were informed about the intention to retrench employees in Applicant's workplace, the meeting was adjourned to 11th May, 2017 in order to allow the employees representatives to go and consult with

the employees. Therefore, it is clear that the employees' representative were given opportunity to consult with employees regarding the retrenchment.

The Respondent submitted that they were not consulted on the respective retrenchment. However, the evidence available especially the testimony of DW1 and DW2 shows that they consulted employees in groups and that the notice of intention to retrench was put on the notice board for all employees to see it. The Act provides in section 38 (1) (d) that in any termination for operational requirements (retrenchment), the employer shall give the notice, make the disclosure and consult with any trade union recognised in terms of section 67; any registered trade union with members in the workplace not represented by a recognised trade union; any employees not represented by a recognised or registered trade union. The evidence available shows that the TUICO was the only trade union available in the Applicant's workplace. Also, there is no evidence at all to show that the Respondents were not TUICO members. In their testimony, the Respondent admitted in cross examination that TUICO was the only trade union available in their workplace and that their wages were deducted from the time they were employed. The Respondent did not state at all that they were not TUICO members. Thus, I don't know where the Arbitrator find evidence to prove that the Respondent were not TUICO members.

Therefore, it is my finding that there is no evidence to dispute Applicant's evidence that Respondents were members of the TUICO and the TUICO properly represented the Respondents in the consultation meetings with the employer according to the law. As a result, I find that the evidence available prove that procedure for retrenchment was fair.

Consequently, I find the application to have merits and I hereby allow it. The Commission decision is revised and CMA award is set aside. Each part to take care of its own cost of the suit.



A. E. MWIPOPO
JUDGE
30/10/2020