IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT DAR ES SALAAAM

REVISION NO. 654 OF 2019

BETWEEN

TUJIJENGE TANZANIA LIMITED..... APPLICANT

VERSUS

THOMAS SOMME..... RESPONDENT

JUDGMENT

Date of Last Order: 02/06/2021
Date of Judgment: 03/06/2021

Z.G. MURUKE, J.

The applicant TUJIJENGE TANZANIA LTD being aggrieved with the decision of the Commission of Mediation and Arbitration (CMA) filed present application seeking for the revision of the award. It is on record that the respondent was employed by the applicant on 13th July,2015 as Business Development Manager and head of operations. He worked with the applicant until 9th May, 2017, when terminated on ground of operational requirement. It was alleged that the applicant faced economic hardships resulted to merging of the department which was under the respondent, as a result his title became redundant. The respondent felt resentful, he referred the dispute to the CMA claiming for the breach of contract. CMA decision was in favour of respondent, that dissatisfied applicant. Revision application was supported with an affidavit of Arnold Eric Munisi, the Company's Secretary, same was challenged with the respondent's counter affidavit.

Both parties were represented by learned advocate, Ms.Christina Mkundi was for the applicant and Prosper Mrema for the respondent .

On the 1st ground, the applicant's counsel submitted that the arbitrator erred in law and fact by wrongly concluding that, the Board's decision to eliminate the Respondent's position was conclusive evidence and proof of the Board's intention to terminate the respondent. That goes against any reasonable realization as one cannot embark on retrenchment consultation, before concluding that the said position and not the person need to be eliminated for operational requirements.

On the 2nd ground it was submitted that the arbitrator erred in law and fact by failing to consider the evidence of DW1 to the effect that, the respondent by virtue of his position as a head of department was a member of the applicant's Board of assets and liability committee (ALCO) and hence privy decisions to merge the respondent's department activities with those of operations which in effect rendered his position/department redundant.

On the 3rd ground it was submitted that the arbitrator erred in fact as he concluded that the respondent's department was merged with operations department due to budget constrains facing the respondent's department. DW1 and DW2 clearly stated in their testimony that the institution was operating under loss so had to abandon its expansion plans to became regulated bank. As result of restructuring the institution had to close its various branches across the country. Even the respondent was aware of the reason of economic slump of business that

is why he prayed for the Deputy Registrar to order the applicant to deposit 15,000,000/= as security.

In regard to the 4th ground applicant's counsel submitted that the arbitrator erred in law and fact by finding that, the applicant have not considered all the alternatives of offering the respondent another position in operation department before terminating him. That was in disregard of DW1's testimony who stated that an experienced operational manager in credit operational and CEO were employed after the company failed to meet the goal of becoming a regulated bank. By that time the respondent served as Operations manager under the circumstances his experience in market fell short of requirement.

Concerning the 5th ground, it was submitted for the applicant that, the arbitrator erred in law and fact by failure to consider the time line from the Board's decision to eliminate the respondent's department due to operational requirement in March, 2017 to the respondent's termination in July, 2017. During that period there was consultation between respondent, CEO and Chairman of the Board as a result they arrived to an agreement as evidenced in a retrenchment letter. Therefore, the applicant complied with the requirement of consultation as per Section 38 (c), (iv) of Employment and Labour Relations Act, CAP 366 RE 2019 (CAP 366 RE 2019),referring the case of **Godfrey Rweikiza & 7 Others v. Stanley Mining Services (T) Ltd, Rev.No.23/2012.**

Concerning the 6th ground Advocate Mkundi contended that, arbitrator erred in law and fact by holding that there was no evidence of financial constraints. The arbitrator ignored the evidence adduced by DW1 and DW2 that the institution was operating under loss.

Concerning the 7th ground it was submitted that the arbitrator erred in law and fact by awarding the respondent 15 months' salary as compensation, without taking into consideration of the amount which was already paid to the respondent a retrenchment package. Thus prayed for the application to be granted.

Respondent's counsel jointly argued on the 1st,2nd and 3rd grounds that, the arbitrator was correct into holding that there was no any evidence that consultation meeting was done. It is the principle of law that he who allege must prove, referring Sections 110 and 112 of the Law of Evidence Act Cap 6 RE 2019. The applicant failed to prove if there was any consultation meeting conducted according to Section 38 of Cap 366 RE 2019 and Rule 23,24 and 25 of the Employment and Labour Relations (Code of Good Practice) Rules, GN.47/2007. There was neither the minutes of a consultation meeting nor any evidence showing that the respondent was issued with notice of retrenchment and invitation to the consultation meeting.

Mr. Mrema further submitted that, the applicant has also failed to prove that there was valid reason for retrenching the respondent. The reason for retrenchment as stated in the termination letter was economic constraints and restructuring of the company. DW1 and DW2 have not tendered any document to prove the said reason. In addition, counsel submitted that if the applicant would have considered the alternatives to mitigate retrenchment, the respondent could have fitted in other positions including Zonal Manager as the respondent was holding various important positions in the Institution like Operations Manager. Therefore, the arbitrator correctly decided that the there was

no valid reason for retrenchment and the procedure were not adhered as required by the law.

On the 5th ground it was argued for the respondent that, the retrenchment was conducted on 9th May,2017 and not July,2017 as claimed by the applicant. The applicant has failed to prove that there was multiple consultation within four months, no any evidence of Board decision to eliminate the respondent's department. This proved that there was no any consultation conducted, it was contrary to Section 38 of Cap 366 RE 2019.

Counsel for the respondent prayed for this court to uphold the CMA's award and in addition the court to order the respondent be paid transport allowance as per clause 7.3 of their employment contract, airtime allowance fact and repatriation costs from Dar es salaam to Sikonge Tabora. He further stated that since the applicant has deposited security coast of 15,000,000/= then court to order payment of 73,250,000/=, He prayed for dismissal of the application for lack of merits.

In rejoinder the applicant's counsel reiterated their submission in chief. In addition, she submitted that the respondent was recruited in Dar es salaam hence not entitled to Transport allowance. And for the communication and fuel allowances were part of employment benefit and were paid to the respondent while at work so as to facilitate his performance.

This court, having considered the parties submissions, records and the applicable laws, issues for determination are;

i. Whether termination on retrenchment was based on a valid reason and stipulated procedures

ii. Reliefs of the parties.

It is a settled principle of law that, termination of employment or retrenchment must be based on a valid reason or reasons and stipulated procedures, for instance the consultation and notification procedures of the workers. For a retrenchment exercise to be substantively and procedurally fair, the employer is required to adhere to the provisions of Section 38 of Cap 366 RE 2019 as read together with Rule 23 of GN 42.

Section 38 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 the ELRA (Code of Good Practice) GN 42/2007 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 effected.

(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 added].

On the substantive part, it was alleged that the reason for the respondent's termination was operational requirement. The applicant having faced economic constraints was forced to restructure the institution by merging the Marketing, Research and Product Development Department which was headed by the respondent to Operations Department.

The procedures for termination on retrenchment are provided under Section 38 of Cap 366 read together with Rule 23 and 24 of GN 42 (supra). George Odhiabo in his book titled **Employment Law Guide for Employers, 2018** at page 339 as cited in the case **of Ringo R.Moses Vs. Lucky Spin Ltd (Premier Casino)** Rev no. 544 OF 2019 insisted the position of the law on retrenchment as cited above, He stated:

"In determining the legality of a redundancy, the court examines the bona fides and integrity of the entire process. Even if it is a fair reason, the dismissal can still turn out to be unfair if the employer fails to act reasonably and follow the steps required to effect fair redundancy."

In the matter at hand the applicant contended that prior the respondent's termination, there were several consultation meeting with the respondent. That was vehemently disputed by the respondent as he argued that he was only summoned on 8th May,2017 and informed of

the company's decision to merge his department and on 9th May,2017 he was issued with a termination letter.

It is a settled law that the procedure for retrenchment should not be adhered in a checklist fashion but the employer must make sure that consultation is requisite and have covered all the important matters. This was stated in the case of **Metal Product Limited v Mohamed Mwerangi** and 7 others, Rev. No. 148/2008, in that case it was held that;

> **" It is my opinion that the various stages itemized under Section 38 are not meant to be applied in a checklist fashion, but rather provide a guideline to ensure that the consultation is adequate and covers all vital matters. Consultation is conducted with view to reaching an amicable settlement and where there is an impasse, the law provides that the matter should be submitted to mediation (section 38(2) of the Act. Whether consultation is adequate depends on circumstances of each case. Where such consultation results in an agreement, signed by recognized representatives of the parties as was done in this case, then the requirement of the law has been met. In the circumstance of this case I find that the arbitrators conclusion on the issue was in err, I set aside that aspect of the award including the order for payment of 12 months' salary."**

From the records, there was a meeting held on 8th May, 2017 in relation to redundancy termination as reflected in a letter dated 9th May, 2017 exhibit P3. For easy of reference the letter is hereby reproduced:-

Thomas Somme,
P.O.65333,
DAR ES SALAAM

9th May, 2017

Dear Thomas,

RE: REDUNDANCY TERMINATION

We are writing to you to confirm our discussions on 8th May, 2017 with regard to the subject matter above.
As we advised you on the date, it has regrettably been necessary to consider certain organizational/operational changes within the company.

As a result of these proposed changes in our company structure we have made the following decision.

To merge the marketing, research and product development department with operations department so that they become one department. Unfortunately, this means that your position will be made redundant.

The Marketing, Research and product Development Department which you are currently heading is a new department which was formed to spear head business growth while we prepare as a Company to transform into a deposit taking and regulated microfinance Company. However, due to budget constraint that we are facing as a company we feel that your department will not be able to meet the purpose of vibrant business growth that was prior intended.

Whilst we have considered all available alternative options, it has not been possible to avoid instituting your position redundant. As explained earlier, your department has been selected for redundancy because it is a newly established department which has yet grown to its fullest potential.

We have attempted to identify a suitable alternative vacancy to offer you, but unfortunately none is available. In the circumstances I confirm that your employment with the company will terminate by reason of redundancy this 9th May, 2017.

Upon termination we will pay you that following severance payments:

1. *Salary for days worked up to including 9th May, 2017 TZS 1,500,000*
2. *Payment for 25 leave days accrued but not taken TZS 4,167,000*
3. *Compensation for 1 months' notice period as per contract TZS 5,000,000*
4. *Negotiated compensation for 2 months TZS 10,000,000*
5. *Severance pay TZS 3,500,000*
6. *Refund for staff Sacco contribution TZS 1,000,000*
7. *The company has been contributing to your pension fund ever since you joined on 12th January, 2015. On that note you can pay a visit to the fund for further arrangements.*

Arrangements will be made to ensure that you receive your final salary payment on *termination of your employment or soon thereafter.*

If you have any queries with regard to any of the terms of this letter or your redundancy generally please do not hesitate to contact us.

In the meantime please let us know if we are able to assist you in any way in finding future employment.

We wish you all the success in the future.
Yours Sincerely.

Sgd:
Jackson Wanjau
Managing Director

Sgd:
Michael Ntobi
Human Resource and Admin Manager

CC: Chairperson HR & Governance Committee
Board Chairperson

I Thomas Somme acknowledge receipt of this termination letter on redundancy this 9th day of May, 2017.

Signature Sgd:

The above letter exhibit P3 was directed to the respondent. He duly signed the letter for termination on redundancy. By signing the letter that referred discussions held on 8th May, 2017, he accepted that there was consultation made and agreed upon. In letter exhibit P3 the last paragraph but one, it is written that.

> **If you have any queries with regard to any of the terms of this letter or your redundancy generally please do not hesitate to contact us.**

The wording are so clear. If there was any queries, the, respondent ought to have asked or cleared first before signing the letter. If respondent was not agreeing to the redundancy, he should have not signed the letter. As the matter stand now, he seemed to have agreed on the exercise and the amount of Tshs. 25,167,000 Tshs, in total as his retrenchment parkage. He cannot turn around and say that procedure was not followed. According to the evidence of DW1, DW2, and letter reproduced above tendered as exhibit P3, the company (applicant) decided to merge the Marketing, Research and Product Development with that of Operations Department due to budget contrains in terms of paragraph five of exhibit P3 that reads;

> **The Marketing, Research and product Development Department which you are currently heading is a new department which was formed to spear head business growth while we prepare as a Company to transform into a deposit taking and regulated microfinance Company. However, due to budget constraint that we are facing as a company we feel that your department will not be able to**

meet the purpose of vibrant business growth that was prior intended.

Applicant considered all possible alternatives as demonstrated at paragraph six of the exhibit P3 that:-

> **Whilst we have considered all available alternative options, it has not been possible to avoid instituting your position redundant. As explained earlier, your department has been selected for redundancy because it is a newly established department which has yet grown to its fullest potential.**

Further at paragraph seven of exhibit P3 applicant considered all possible alternatives to ensure that termination if any is a last resort as follows:

> **We have attempted to identify a suitable alternative vacancy to offer you, but unfortunately none is available. In the circumstances I confirm that your employment with the company will terminate by reason of redundancy this 9th May, 2017.**

Basing on the evidence on records, reasons for retrenchment were clearly started and elaborated. More so procedure was also followed as accepted by respondent when signed exhibit P3. Thus filing of the case was an afterthought, as respondent agreed and signed exhibit P3. This court has no power to interfere with terms of contract that parties have agreed, unless there is fraud, which there is none. Issue of restructuring the company is decision of employer, to be able to run smoothly her business of which respondent consented by signing exhibit P3, thus court is retrained from interfering. This was decision 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"**

Evidence on record proved that retrenchment was necessary to reduce costs as accepted by respondent when signed exhibit P3. Equally, procedure for retrenchment was properly followed in terms of exhibit P3. Thus, decision by arbitrator that, there was no reasons for retrenchment and produce was not followed is not backed up by evidence. In totality CMA award is quashed and set aside. Revision application allowed.

Z.G. Muruke

JUDGE

03/06/2021

Judgment delivered in the presence of Brenda Mahimbo, Principal Officer of the applicant and respondent in person. Copy of the judgment, Decree and Proceedings are ready for collection.

Z.G. Muruke

JUDGE

03/06/2021