

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

REVISION APPLICATION NO. 945 OF 2019

(Originating from Labour Dispute No. CMA/PWN/KBH/54/2019)

BETWEEN

MASASI FOOD INDUSTRIES COMPANY LTD..... APPLICANT

VERSUS

DENNIS JAMALDIN NAMANGA.....1ST RESPONDENT

GASPER STANLY CHONYA.....2ND RESPONDENT

WILFRED A. BULEMO.....3RD RESPONDENT

JUDGMENT

Date of Last Order: 26/10/2021

Date of Judgment: 10/12/2021

I. Arufani, J.

The applicant in the revision at hand is beseeching the court to call and examine the record of the proceedings, revise it and set aside the whole proceedings and award of the Commission for Mediation and Arbitration of Kibaha Coast Region (herein referred as the Commission) in Labour Dispute Number CMA/PWN/KBH/54/2019 dated 15th November, 2019. The application is made under section 91 (1) (a) and (b), 91 (2) (b) and (c), 94 (1) (b) (i) of the Employment and Labour Relations Act, Act No. 6 of 2004 (hereinafter referred as

the ELRA), Rule 24 (1), 24 (2) (a), (b), (c), (d), (e) and (f), 24 (3) (a), (b), (c) and (d) and Rule 28 (1) (c), (d) and (e) of the Labour Court Rules, GN No. 106 of 2007 (herein after referred as the Rules).

The application is supported by the affidavit sworn by Leonard Laurian Mjoly, the applicant's Human Resources Manager and was replied by three counter affidavits sworn by of each the respondent in the application. While the applicant was represented in the application by their Human Resources Manager namely Mr. Leonard Laurian Mjoly, the respondents were represented in the matter by Mr. Abraham John Mkenda, Personal Representative from TUICO Coast Region. By consent the application was argued by way of written submission.

The brief facts of the case as can be found in the record of the instant application are to the effect that, the respondents were employed by the applicant on different dates between the year 2012 and 2018 and they were employed on different position. On August, 2018 it was seeing that, operation of the company was difficult. On December, 2018 the applicant gave the respondents and other employees three months leave without pay. After failing to continue with production the applicant decided to retrench the respondent and

on 17th May, 2019 the respondents were served with letters of retrenching them from their employment.

The respondents were dissatisfied by the decision of their employer to terminate their employment and referred their dispute to the Commission claiming for various reliefs basing on unfair termination of their employment. The Commission found termination of employment of the respondents was fair both substantively and procedurally and awarded the respondents, unpaid leave, one month pay in lieu of notice, severance pay and ordered the respondents to be paid the salaries of two months of April and May, 2019. The applicant was dissatisfied by the award issued by the Commission and filed the present application for revision in the court.

The part of the submission of the applicant which is relevant in the determination of the present application is to the effect that, exhibit A1 admitted in the matter before the Commission shows the respondents were given three months leave without pay after the parties discussed and reached consensus. It is argued that, after seeing the applicant had failed to recover economically the applicant and the respondents together with other employees entered into voluntary agreement on 3rd April, 2019 to enter the names of the

respondents in the list of the employee who would have been retrenched as evidenced by exhibit A2.

On 17th May, 2019 they agreed on how their payment would have been made and the entitlement of the respondents were put in exhibit A4. It is argued in the submission of the applicant that, the payment of the salaries of April and May, 2019 ordered in the award of the Commission was not among the entitlement agreed by the parties and were granted erroneously as there is no work done on the period of April and May, 2019 and there is no evidence adduced to support the same.

The applicant referred the court to section 110 and 111 of the Evidence Act, Cap 6 R.E 2019 which cast the burden of proof on the who assert existence of a certain fact. To support the argument the applicant referred the court to the case of the **Registered Trustees of Joy in the Harvest V. Hamza Sungura**, Civil Appeal No. 149 of 2017 CAT at Tabora (unreported). The applicant submitted the application has merit and prayed to be granted to the extent explained.

In reply to the above submission of the applicant, the respondents stated in their joint submission that, it is true that the respondents agreed to be given three months leave due to financial constraint which the applicant was facing. It was argued it was not agreed that the leave will be without pay and stated even exhibit A1 is not stating the three months leave would have been without pay. It is argued further that, even if there was such an agreement but still the applicant was legally bound to pay salaries to the respondents as they were still their employees.

It was argued further in the respondents' submission that, financial constraint is no a reason for avoiding payment of salaries to employees and the only remedy available in such a situation is to retrench the employees as provided under section 38 of the ELRA. It was stated the agreement which the applicant is claiming was entered with the respondents is not recognized by our laws. He said the honourable Arbitrator was correct in granting the respondents the reliefs granted in the award. Although he agreed section 110 and 111 of the Evidence Act cast the burden of proof on who he asserts and want the decision in his favour but he argued that, in labour matters

the position is different as the burden of proof lies to the employer as provided under section 39 of the ELRA.

He distinguished the case of the **Registered Trustees of Joy in the Harvest** (supra) by arguing that was a civil appeal where burden of proof is on who he asserts while in the labour matters the burden lies to the employer. She argued that, the Arbitrator did not alter or rewrite the agreement which was entered but he considered the law regulating labour matters in Tanzania in the course of analysing the evidence adduced by the parties. They argued that, the respondents were retrenched after the elapse of three months and if they had already been retrenched why they were called to convene a meeting with the applicant. They argued the application is without merit and urged the court to dismiss the same with costs and proceed to uphold the award of the Commission.

The applicant stated in their rejoinder that, exhibit A1 together with annexure STJ-02 to the affidavit shows the three months leave was without pay. It was argued by the applicant that, during the leave time the applicant had no further responsibility to pay salaries to the respondents as the applicant was not in control of the respondents and the respondents were allowed to search for new

jobs that may give them remuneration to sustain themselves. As for the argument that the parties' agreement cannot be recognized by the law is misplaced.

It was argued by the applicant that, the law is settled that parties are bound by the terms of their agreement they freely entered and the court or any third party cannot alter the said agreement. To support their argument the respondents referred the court to the case of **Timothy Mgaya and 10 Others V. Syscorp Group Ltd. and Another**, Misc. Application No. 294 of 2019 HCLD at DSM (Unreported). As for the burden of proof the applicant argued that, employer has a duty to prove termination was fair but in the case at hand the issue to prove was not unfair termination but the claims of payment raised by the respondent. At the end the applicant prayed the application to be allowed.

Upon considering the submission from both sides and after going through the record of the matter the court has found the issue to determine in this matter is whether the respondents were entitled to be paid the reliefs awarded to them by the Commission. The court has framed the stated issue after seeing the parties are vehemently locking horns on the payment of salaries of April and May, 2019

ordered by the Commission. As for the other reliefs awarded to the respondents by the Commission the court has found the applicant has not stated anything to challenge what was awarded by the Commission. Their argument is that they cannot afford to pay anything more than what they agreed with the respondents because of the financial constraint they are facing.

Starting with the award of payment of salaries for the months of April and May, 2019 made by the Commission the court has found that, exhibit A1 which are letters for leave without pay issued to the respondents shows the respondents were required to be on leave without pay from 1st January to 31st March, 2019. The evidence adduced before the Commission did not show there was anything stated anywhere that after the end of the three months leave the respondents would have continued to be paid their monthly salaries or not. What is stated in exhibit A1 is that, if the applicant's financial position would have improved, they would have been informed to go to continue with work.

The evidence available in the record of the matter shows after the end of the three months leave the respondents continued with discussion with the applicant about the fate of their employment until

17th May, 2019 when they were retrenched from their employment. It is the view of this court that, as the leave without pay ended on 31st March, 2019 and the respondents were retrenched from their employment on 17th May, 2019, they were entitled to get the salaries of the period they were not on leave until when they were retrenched from their employment.

The court has considered the argument by the applicant that as the respondents were not continuing with work, they were not entitled to be paid salaries for the period they were not working but failed to see merit in the said argument. The court has arrived to the above finding after seeing that, as the respondents had not been terminated from their employment and they were still employees of the applicant they were entitled to be paid salaries for the period they were not on leave.

However, the court has found the respondents were entitled to be awarded the salaries of one month of April, and seventeen days of May, 2019 and not full salary for the month of May, 2019. That is because there is no justifiable reason for paying the respondents the full salary of the month of May, 2019 while they had already been terminated from their employment from 17th May, 2019.

As for the rest of the reliefs awarded to the respondents by the Commission the court has found they have not been substantially challenged by the applicant. The only argument raised by the applicant is that they cannot pay more than what they had agreed on exhibit A1 because of the financial difficulties they are facing. The court has considered the argument that the applicant cannot pay more than what they have stated in exhibit A1 but failed to see any merit in that argument.

The court has been of the view that, as the respondents' employment had not been terminated and after leave without pay, they continued to attend meeting with the applicant of discussing the fate of their employment until 17th May, 2019 when their employment was terminated, it cannot be said they are not entitled to be paid their salaries for the period they were not on leave on ground that the applicant has no ability to pay them. In the premises the court has found the Arbitrator was right in awarding the respondent the salaries of the period they were not on leave though that payment was supposed to end when their employment was terminated.

In the premises the application of the applicant for the court to revise the award of the Commission is partly allowed to the extent

stated hereinabove. The respondents will be entitled to all reliefs awarded by the Commission in the award save for the salary of May, 2019 which they will be entitled to get salary of only 17 days of that months and not salary of the whole month of May, 2019. In the upshot the first respondent, Denis Jamaldin Namanga will be paid the sum of Tshs. 1,312,307.69. The second respondent, Gasper Stanley Chonya will be paid the sum of Tshs. 482,102.53. The third respondent, Wilfred Albinus Bulemo will be paid the sum of Tshs. 1,191,871.76. It is so ordered.

Dated at Dar es Salaam this 10th day of December, 2021.

I. Arufani

I. Arufani

JUDGE

10/12/2021

Court: Judgment delivered today 10th day of December, 2021 in the presence of Mr. Seki Nyenza, Marketing Officer for the Applicant and in the presence of the 3rd Respondent in person. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

I. Arufani

JUDGE

10/12/2021