IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 940 OF 2019

BETWEEN

ABDUL WAZIRI & 50 OTHERS ..... APPLICANT

VERSUS

ISON BPO TANZANIA LTD .... RESPONDENT

JUDGMENT

Date of last order: 20/09/2021
Date of Judgement: 03/12/2021

M. Mnyukwa, J

The applicants filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (CMA) which was delivered on 28/07/2016 in Labour Dispute No. CMA/DSM/TEM/448/2014. The application is made under section 91(1) (b), 91(2)(a) and (b) together with 94 (1) (b) (i) of the Employment and Labour Relations Act, [CAP 366 RE 2019] (herein the Act) and Rule 24(1), 24(2)(a), (b), (c), (d), (e) and (f), 24(3)(a), (b), (c) and (d) and Rule 28(1)(a), (b), (c), (d) and (e) of the Labour Court Rules GN No.106

of 2007 (herein GN 106 of 2007). The application is supported by the applicants' affidavit.

The respondent challenged the application through the counter affidavit of Sophie Kaiku, the Legal Manager of Ison BPO Tanzania Ltd. The matter proceeded orally. At the hearing Mr. Omari Msemo, learned Counsel appeared for the applicants where as Mr. Peter Ngowi, learned Counsel represented the respondent.

The applicants are praying for the following orders: -

1. That this Honourable Court be pleased to call for and examine the records of CMA Award received on the 4th August, 2016 in Labour Dispute No. CMA/DSM/TEM/448/2014 by Honourable Arbitrator Johnson Faraja for purpose of satisfying itself as to the correctness, legality or propriety of the proceedings and orders made therein and revise and set aside the same.
2. That this honourable court grants any other relief as it seems just, fair and fit to be granted

The applicants have advanced nine grounds for the court to consider and determine. The grounds of revision were also filed in this court as the statement of legal issues.

1. *That, the Arbitrator failed to consider that COTWU – the trade union within its branch and leaders at the respondent's workplace were not consulted before the beginning of the retrenchment process;*
2. *That, the Arbitrator failed to consider that no notice of any intention was issued by the respondent when the alleged retrenchment was contemplated;*
3. *That, the Arbitrator's Award was improper for failing to consider that the same applicants were not invited for the information sharing meeting;*
4. *That, the Arbitrator's Award was improper for assuming that every applicant attended several consultation meetings while in fact they attended only one meeting and not for consultation purpose, but to be informed of the decision unilaterally arrived by the respondent;*
5. *That, the Arbitrator's erred in finding that there was proper notice issued to the applicants to attend information meeting*
6. *That, the Arbitrator's Award was improper and unfounded by rejecting prayers of even those applicants who were denied rights to attend the purported consultation;*
7. *That, the Arbitrator's Award was improper for considering the matters of deed of settlement which was induced to each worker individually without permission to consult and/or seek legal advice;*

8. *That the Award was improper by failing to find that the respondent's conduct did not amount to consultation for the purpose of retrenchment based on operational requirements; and*
9. *That, the arbitrator failed to give proper weight to the evidence that the workers union was not properly consulted before retrenchment.*

The brief facts of the case is that, the applicants were employed by the respondent on different dates from 2009 as customer care (call centers support) until August 2014 when their contracts of employment were terminated. It was alleged that the applicants were terminated on operational requirement of respondent's business. Aggrieved by the decision of the respondent, the applicants referred the matter to the Commission of Mediation and Arbitration (CMA). The matter was heard interparty and the CMA delivered its Award on 28/07/2016 where the complaint was dismissed on the reason that the termination was fair both substantively and procedurally. Following the decision of the CMA, the applicant filed the present application for revision against the Award.

During submission, the counsel for the applicant combined all nine grounds of revision to form three issues namely: -

1. *Whether the applicants were served with the proper notice before the purported retrenchment carried out;*
2. *Whether the trade union was properly consulted prior to purported retrenchment was carried out; and*
3. *Whether the deed of agreement signed qualified the taste of consultation for the purpose of retrenchment based on operational requirement.*

In his submission the counsel for the applicants submitted that one of the requirements prior retrenchments to take place as it is provided for under section 38(1)(a) of the Act is to issue notice. He submitted that going through the evidence adduced by the respondent, there was no evidence suggesting that the actual notice was issued as per the requirement of the law. He added that the Town Hall Meeting done by the respondent to inform the applicants that there was retrenchment exercise majority of the applicants did not attend because the actual notice was not issued as per the requirement of the law. The counsel stated that PW1 averred that there was no any notice served to the applicants before retrenchment as well as PW2 and PW4 testified that she was not aware with the retrenchment exercise because the notice was not served to them. He prays the Court to address this issue

in affirmative because failure to issue notice is fatal and that irregularity is against the law.

On the second issue, the counsel for the respondent submitted that, according to section 38(1)(b) of the Act, it requires the employer to consult and disclose to the trade union of which the employees are members on the intended retrenchment. He averred that in the present case the employees' trade union known as COTWU was not properly consulted before retrenchment which is against the requirement of Rule 23(6) of the Employment and Labour Relations (Code of Good Practice) GN No. 24 of 2007. He went on to state that, the testimony of DW1 shows that the trade union was consulted on 31/07/2014 and on the same the retrenchment exercise commenced. He added that PW1 testified that they have communicated with the respondent and informed that the ongoing retrenchment exercise was not in accordance to the law but the respondent did not rectify. He averred that the communication was not done in good faith as there were two letters one dated 31/08/2014 that purported to communicate with trade union and the available record shows that the retrenchment commenced on 21/08/2014. He referred to page 24 of the CMA's proceedings to show that the communication done to the trade union was not proper.

On the third issue, the counsel of the applicant averred that the purported deed of settlement was not signed by the applicants on their free will. That the applicants were influenced by number of factors to sign it.

He gave an example of PW5 who testified that his consent was obtained by force or undue influence, PW4 testified that he was forced to sign the deed of settlement and he was not allowed to take it outside for the purpose of consultation as well as PW3 who testified that they were not allowed to reveal the contents of the document as it was confidential between the applicants and the respondent. The counsel for the applicants insisted that the applicants being a laypersons ought to have been given a chance to consult before signing.

He went on to state that it is a trite law that an agreement which is entered without free consent is voidable at the option of the party who gave such particular consent. He added that there were irregularities in the entire exercise which were also admitted by the arbitrator but very unfortunate the arbitrator ruled out in favour of the respondent. He concluded his submission in chief avers that he was aware that the procedure should not be used as a checklist fashion and what is important is for the procedure to be fair to ensure that

termination for any reason should not be arbitrary. He insisted that the entire process was not fair because it was contrary to the law. He therefore prayed the Court to set aside the CMA's Award and to grant reliefs prayed for in chamber summons.

Responding to the application, the respondent's counsel prays the Court to adopt his notice of opposition and the counter affidavit filed therein to form part of his submissions. On the first issue framed by the applicants' counsel he submitted that, the available record shows that PW1 admitted on his testimony that the respondent issued notice on 31/07/2014 as well as PW3 who admitted that the notice was issued on 31/07/2014 as it is evidenced in exhibit D1 and the same is reflected at page 20 of the CMA's proceedings.

He went on that section 38(1)(d)(i)(ii) of the Act is silent on the form of giving notice, what is provided for is the issue of information or awareness of the exercise and the same is done as it is shown in exhibit D1, D2, D3 and D4 in which through these exhibits, the applicants were aware of the exercise.

On the second issue, the counsel of the respondent submitted that the trade union was informed and consulted as per requirement of section 38(1)(d)(i)(ii) of the Act which requires the respondent to give

notice, disclosure and made consultation with trade union. He averred that the same was done through exhibit D3 and D4 whereby the letters were given to the leaders of the trade union and consultation was done through the meeting as it is reflected at page 24 of the CMA proceedings. He referred to page 59 and 60 of the CMA's proceedings in which PW1, the chairman of COTWU admitted that trade union was informed and consulted. The counsel of the respondent insisted that the testimony of PW1 shows that he was involved in consultation and that consultation took more than seven days and PW1 on his own will he did not challenge if there was something wrong in a particular consultation. He went on that an allegation put forward by the applicants that the trade union was not consulted is not true because PW1 admitted that there was power point presentation on the reasons as to why the respondent conducted that exercise and that amount to disclosure in law.

The counsel of the respondent further stated that, the assertion that consultation meeting was done on 31/08/2014 instead of 31/07/2014 that assertion was rectified with PW1 as he admitted that they were given notice on 31/07/2014 instead of 31/08/2014.

On the third issue, the counsel of the respondent submitted that, there was no anywhere the applicants successfully convinced the CMA that separate individual deed agreement for retrenchment was signed by inducement or coercion. He averred that; the applicants signed exhibit D6 at their own free will because by that time they were aware with its contents. He added that the applicants being graduates, not lay person as alleged, were at free will to refuse to sign the deed of settlement if it was procured by coercion.

The counsel of the respondent submitted that, the Court addressed the issue of procedural requirement on various decisions including the case of **Bernard Gindo & 27 others vs Tol Gases Ltd,** Revision No 18 of 2012, HC Labour Division at Dar es Salaam and the case of **Moshi University College of Cooperative & Business Studies vs Joseph Reuben Sizya,** Revision No 11 of 2012, HC Labour Division at Dar es Salaam.

The counsel of the respondent insisted that the procedure was followed and PW1 were involved and so long as they did not refer the matter to CMA as per the requirement of section 38(2) of the Act, this suggested that they willfully agreed and this resulted the respondent to proceed with consultation to an individual employee. Thus, the

applicants are precluded to allege that at the time of entering into agreement they were under coercion.

In rejoinder the applicants counsel reiterated what he had submitted in chief and he added that the communication under Exhibt D1 is not a notice within the meaning of section 38(1) of the Act. He added that the notice is different from the information and had the law required an employee to have a mere knowledge or awareness on the retrenchment, the law could have stated it so clearly. He insisted that the notice had purpose to serve and can not be substituted by the information or awareness.

On the issue of the consultation to the trade union, he averred that the record shows that trade union were consulted on the same day when retrenchment took place, that defeat the purpose of the law. He added that it is also on record that the trade union attended consultation on 07/08/2014 while the exercise had already commenced. He insisted that failure to refer the matter to CMA does not mean that the procedure was proper and therefore can not bless the procedure that were not followed.

The counsel for the applicants ended up by submitting that much as the procedure were not followed as submitted, the cases cited by the

counsel for the respondent have nothing to do and they can not be used in favour of the respondent.

It was further argued that, the respondent believed that the applicant was properly addressed on the issue of termination as in accordance with section 38(a) and (c) (ii) and (v) of the Act. To buttress his argument, he cited the case of **Mohamed Chambuso and 51 Others V. Air Tanzania Co. Ltd**. HC Lab. Rev. No. 172 of 2014, 2015 [LCCD] 1 where the court stated that a person may be retrenched if there is a reason of change of business because they were employed by the other company. He added that, the case cited by the applicant is not relevant to the case at hand. He therefore, prayed for the application to be dismissed with costs.

After considering the rival submissions from both counsels, I find that what is disputed is the procedure for retrenchment and not the reasons for retrenchment. In other words, it is undisputed that there were valid reasons for retrenchment. Thus, I find no need to labor much to discuss the substantive part of termination. That being the case, this Court is called upon to determine the following issues,

(i) *Whether the procedure for retrenchment of the applicants' employment by the respondent was fair; and*

(ii) *Reliefs that parties are entitled to.*

On the first issue as to whether the termination of the applicants' employment was fair in terms of procedure, our guiding law is the Employment and Labour Relations Act, [Cap. 366 R. E. 2019]. Section 38 of the Act provides for termination based on operational requirements (retrenchment). The section provides that: -

> *38(1) In any termination for operational requirements the employer shall comply with the following principles, that is to say, he shall: -*
>
> (a) *give notice to any intention to retrench as soon as it is contemplated;*
>
> (b) *disclose all the 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 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 work place not represented by a recognized trade union; and

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

The above section requires the employer to adhere with the procedure stated under section 38(1) of the Act when termination of the employee for operational requirement. The employer is required to comply with four mandatory principles which includes giving notice of any intention to retrench, disclosure of all relevant information on the intended retrenchment, consult prior to retrenchment and to give notice of retrenchment.

The above stipulated procedures and principles are mandatory and have to be adhered by any employer on termination for retrenchment. The section is in *pari materia* with Rules 23 – 24 of the Employment and Labour Relations (Code of Good Practice) Rules, GN 42 of 2007 (herein referred as GN 42 of 2007).

In the application at hand, the applicant counsel contention that the procedure was not properly followed as per the requirement of the law. He argued that the notice was not issued as per the requirement of the law while the respondent averred that the notice was given to the employees and they were aware of the exercise.

It was the CMA's finding that the respondent complied with the procedure for retrenchment. The evidence on record shows that the respondent notified the applicants on the presence of the town hall meeting which aimed at starting consultation process so as to give opportunity to the respondent to disclose all relevant information to the intended retrenchment. The evidence of PW3 suggests that the notice was issued to the applicant This is reflected on page 70 of the CMA's typed proceedings. When he was giving his evidence under oath, part of the conversations was as hereunder:

"S. Mlalamikiwa alikujulisha juu ya kupunguzwa kazi?

J. Tarehe 31/07/2014 nakumbuka nikiwa kazini niliitwa na meneja wangu nikiwa kazini na kuambiwa kuwa wote tuliokuwepo shift ile tulihitajika chumba cha mkutano na mlalamikiwa.

Hapo nilipata kuuliza kwa nini tumeitwa muda wa kazi, nilijibiwa kuwa hayo tutapata kuyafahamu hukohuko.

Tulipofika chumba cha mkutano tulimkuta Bw. Areja na Bernadeus wao walikuwa na taarifa waliyopata kuiandaa na walipata kuweka kwenye projector."

The evidence of PW3 is supported with Exhibit D1 and D4 which shows that respondents attended the meeting after they have been informed about the presence of the town hall meeting. This suggests that, the notice was issued to them.

If the notice was not issued to them, applicants would not have attended the meeting It has to be understood that the notice serves a different purpose or objective, the main purpose being to facilitate effective consultation. The Act is silent on the modality of issuing notice and the notice period.

It is my considered view that the fact that the respondent did not tender a written notice to show that the same was issued, but on the

other side of the coin the fact that the applicants attended the town hall meeting suggests that the notice was issued as it is reflected above through the evidence of PW3 which join hands with Exhibit D1 and D4.

It is the argument of the applicants' counsel that some of the applicants to include PW4 and PW2 were not given notice. In a present case, it is clear that the respondent has contemplated the retrenchment on the technological changes as it was rightly decided by the arbitrator. In those circumstances the respondent could not have stopped the same on the reason that one of the applicants was on maternity and the other one was in the head office. I am persuaded with the decision of Hon. Aboud, J. in the case of **Janeth Mshiu v Precision Air Service Limited,** Labour Revision No. 588 of 2018 as she held that:

> *"It is also my view that, under normal circumstances if the respondent has contemplated the retrenchment on the stated reasons, they could have not stopped the same just because the applicant was on her maternity leave,"*

So long as the applicants attended the town hall meeting, it is my considered view that the notice was issued to inform them about the presence of the said meeting, I therefore agree with the arbitrator finding that in this aspect the procedure was followed.

The second procedural issue that was challenged by the applicants was the issue of consultation to the trade union as it is required by the Act. The applicants alleged that the trade union was consulted on the same day when the exercise commenced, the notice was not given in good faith since there were two letters dated 31/07/2014 and 31/08/2014 respectively, and thus defeat the law and the purpose of the exercise. Responding on that issue, the counsel for respondent submitted that the trade union was consulted.

I have gone through the records and find that the respondent informed the trade union COTWU as evidenced in Exhibit D2 and D3 which were the letters dated 31/07/2014 and 31/08/2014. The contents of the letters are the same. Both letters informed the Chairperson of COTWU that the meeting was scheduled to take place on 1st August, 2014 at 10 a.m. and the matters that the chairperson was expected to be presented in that meeting were listed down in the said letters. The evidence on record clears the issue on when COTWU was informed about the exercise. The evidence of DW1 when he was examined shows that COTWU was informed on 31/07/2014, the same answer was given when he was cross examined as it is evidenced at page 24 and 30

of the CMA's proceedings. Therefore, the allegation of the counsel of the applicants that there was no good faith on a consultation on a reason that two letters were issued has been rectified as it was rightly stated by the respondent that the correct date was 31/07/2014.

The available record also shows that consultation was conducted before retrenchment as it is evidenced in the Exhibit DI, the town hall meeting and Exhibit D4 the minutes of the meeting. The minutes shows that the applicants were asked and aired their view by asking questions to the respondent and the same were answered and recorded to form part of the minutes. Furthermore, on his testimony PW1 admitted that they were consulted as it is reflected at page 59 and 60 of the CMA's proceedings.

Thus, it is my view that the respondent adhered with the requisite procedure when terminating the employment of the applicants through operational requirement and ensure that the fair hearing is afforded to both parties. That, what is important is for procedure of termination to be complied particularly the right to be heard and the same can not be complied in the checklist form. (See the case of **Exim Bank (T) Ltd v Jacqueline A. Kweka,** Revision Application No 429 of 2019, HC Labour

Division at Dar es Salaam and the case of **NBC Ltd v Justa B Kyaruzi,** Revision No 79 of 2009 HC Labour Division at Mwanza.)

On the last issue, the applicants alleged that the deed of settlement was signed out of the free will of the applicants. He averred that the deed of settlement was signed out of necessity and some of the applicants signed the deed of settlement by force or undue influence. On the other side the respondent strongly denied the averment of the applicants that the deed of settlement was signed out of their free will. He enlightened that the applicants being graduate and professional were in a position to comprehend the contents of the deed of settlement.

According to the applicants' counsel, among the applicants who was forced to sign the deed of settlement is PW5. I have carefully examined the CMA's proceedings to see if PW5 was forced to sign the deed of settlement. When PW5 was cross examined as it is reflected at pages 98 and 99 of the proceedings, he testified that he was forced to sign but unfortunately, he did not reveal how he was forced to sign the same. A mere statement that he was not allowed to go outside with the document for consultation, in my view is not sufficient evidence to show that he was forced to sign because he could have opted not to sign.

The CMA's proceedings as it is reflected in pages 26, 27 and 28 suggests that the applicants were properly consulted with a view of making up their minds on whether to sign the deed of settlement or not. The testimony of DWI shows that individual consultation was held to the applicants to inform them the reasons for retrenchment and their entitlement after the exercise. That testimony was not challenged in the cross-examination. For easy of reference, I quote the testimony of DWI on his verbatim as hereunder: -

> *"Tulifanya nao Consultative meeting hapo tulikutana na mmoja mmoja kati yao, tulipata kuwaeleza haki zao juu ya upunguzaji huo na stahiki zake hasa baada ya kuwaelewesha ulazima wa kufanya hivyo".*

When he was examined about the individual consultation, the conversations which is part of the CMA's proceedings were as follows:

> *"S. Majadiliano ya mmoja mmoja yalikuwa kati ya nani na nani?*
>
> *J. Wafanyakazi na Uongozi*
>
> *S. Mlipata kufikia hatua ipi baada ya hapo?*
>
> *J. Walipatiwa malipo yao."*

After carefully going through the CMA's proceedings, I have also examined the deed of settlement, Exhibit D6, I have no hesitation that the applicants signed the said document with their free will after they have read and understood the deed of settlement. As it was rightly stated by the advocate for the respondent, my mind is settled that the terms contained in the deed of settlement were clear and presented in a language for any graduate to comprehend.

The averment of the counsel for the applicants' is that the deed of settlement contained a clause denied the applicants the right to make consultation by sharing the contents of the deed. To my understanding, that averment is misconceived because the said clause ensures the confidentiality of the information while the retrenchment exercise was going on for the purpose of protecting the crucial information to be divulged before the completion of the exercise.

On the foregoing discussion, I still hold the view that, If the applicants were unwilling and if they had any complaint with the exercise, they could have referred the matter to the CMA for Mediation as it is provided for under section 38(2) of the Act which provides that:

"Where in the consultations held in terms of subsection (1) no agreement is reached between the parties, the matter shall be referred to mediation under Part VIII of the Act."

In our case at hand, it was expected the applicants to have challenged the retrenchment by referring the matter to the CMA for mediation if they were not satisfied with the retrenchment exercise. Also, it was not expected for the applicants to have signed the deed of settlement if they did not consent to the retrenchment exercise. Failure to do so, suggests that the applicants consented to the exercise on their free will and in the circumstances, it is very difficult to prove if there is coercion or undue influence in the retrenchment exercise.

As it was rightly stated by the Court of Appeal of Tanzania in the case of **Simon Kichele Chacha v Aveline M Kilawe,** Civil Appeal No 160 of 2018, CAT at Mwanza (unreported), where it was pointed out that: -

"It is settled that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is there should be a sanctity of the contract."

The Court of Appeal of Tanzania made the above observation by referring the case of **Abually Alibahi Azizi v Bhatia Brothers Ltd** (2000) TLR 289 which held that: -

> *"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement."*

Guided by the above decision, the respondent was right to enforce the deed of settlement signed by the applicants as a contract because it was not proved that the same was signed by coercion or undue influence, thus it is subject to enforcement.

On the issue as to parties' relief, it is on record that the applicants were paid all their statutory terminal benefits as it is provided for in Exhibit D6. Since the termination of the applicants' employment for operational requirement was based on valid reasons and the procedures were adhered to, the applicants are not entitled to any compensation provided under section 40 of the Act.

In the final analysis, I am not faulting the findings of the Arbitrator that there was valid reason for termination and the procedure were

followed. Thus, the application has no merit and I hereby dismiss it. The CMA Award is upheld.

No order as to costs. It is so ordered.

M. MNYUKWA

JUDGE

03/12/2021

Right of appeal explained to the parties.

M. MNYUKWA

JUDGE

03/12/2021