IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 875 OF 2019

BETWEEN

MUSTAFA M. MROPE .... 1st APPLICANT

ESTER MKANDAWILE .... 2nd APPLICANT

VERSUS

ULTIMATE SECURITY (T) LIMITED .... RESPONDENT

JUDGMENT

Date of Last Order: 21/06/2021

Date of Judgment: 02/07/2021

L.J. Itemba, J.

Mustafa M. Mrope and Ester Mkandawile filed this application seeking for revision of the decision issued by the Commission for Mediation and Arbitration (CMA) on 24/10/2019, in Labour Dispute No. CMA/DSM/KIN/R.206/17/324. The decision was in favor of the Respondent.

The applicants have raised two preliminary objections that; which are based on the respondent using the wrong terminology *"mgogoro wa kikazi"* instead of "*maombi ya marejeo*" and that the respondent did not indicate the reliefs sought. The Court will not invest much on these objections as they are technical issues and do not go to the root of the main application.

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The applicants could not show how respondent's failure to use the right term and failure to indicate the relief sought has occasioned injustice on their part. On that basis the Preliminary Objection is dismissed for lack of merit.

Having said that the Court will direct its attention on the application for revision.

In order to comprehend what transpired in the CMA, the facts are briefly as follows. Both applicants were employees of the respondent employed on diverse dates, as security guards. Following the respondent loosing 2 big clients namely 'MSD' and 'Oryx', employees including the applicants were retrenched on grounds of operational requirements of the respondent business. The applicants' employments were terminated on 15/2/2007. The applicants complained before the CMA it was decided that the respondent was substantially and procedurally fair in retrenching the applicants.

When the matter was called for hearing, the applicants represented themselves while the respondent, Ultimate Security Ltd. was represented

by Richard Liampawe a Senior Legal Officer for the respondent. Hearing was conducted by way of written submissions.

In their affidavit paragraph 4 to 8, the applicants have raised the following grounds;

1. *That the arbitrator erred in law the nature of the Dispute she did not understand be care she was the second arbitrator to arbitrate the dispute and we are doubt about the proceedings of the first arbitrator whether she handed the file to another arbitrator properly.*
2. *That the arbitrator erred in law in her award page a by citing section 38(1)(a)(b)(c)(i-v) of the employment and Labour Relations Act No. 6 of 2004 while the respondent in his Evidence did not mention that in the procedure of retrenchment, he gave any notice for retrenchment.*
3. *That the arbitrator erred in law in her award the respondent has a good reason for retrenchment while in the evidence state by the DW1 Safari Habib, he did not show that there was a termination of the locations guarded by the respondent he failed to produce evidence from MSD, Oryx.*
4. *That the arbitrator erred in law in her award by not consider that we were the Trade Union Leaders. Mustafa Mrope was the Branch Secretary of CHODAWU and Ester Mkandawile was the Branch Secretary of TUPSE, that their Leadership was important to the members of their Trade Union (Employees).*

5. *That the arbitrator erred in law in her decision when she considered the Evidence of DW1 Safari when he submitted the minutes of the meeting of TUPSE and CHODAWU which was not signed.*

The respondent filed a counter affidavit sworn by Tatu Elias, Human Resources Officer of the Applicants' company.

I have gone through the grounds of revision and these grounds can be grouped into 2.

(i). That termination of the applicants was not fair substantially and procedurally.

(ii). That the case was heard by 2 arbitrators an act which has affected the final decision of the commission.

The procedure for termination based on operational requirements (retrenchments) is governed by Section 38 of the Employment and Labour Relations Act No. 6/2004 (ELRA). The said section states 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.

(2) Where in the consultations held in terms of sub-section (1) no agreement is reached between the parties, the matter shall be referred to mediation under Part VIII of this Act.'

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Starting with section 38(1) (a) there is a requirement of issuance of notice by the employer, at page 12 of the proceeding, DW Jafari Habibu explained that prior to retrenchment the Respondent notified the employees through an announcement on the notice board and a memo. He did not explain how the said memo was shared to the employees to ensure that they are informed of its contents.

The law does not provide for the manner in which the notice shall be issued therefore, it will depend with circumstances. However, placing an announcement on a wall and distributing a memo to employees, in this Courts' opinion, is not satisfactory means as it does not create a room for feedback to the employer. It is not easy for the employer to be sure that the information has reached every intended employee. Notice for retrenchment is an important information, the respondent would have taken better ways to communicate the same.

Section 38(b) creates a requirement of disclosing relevant information on the intended retrenchment (c) consultation and (d) disclosure to trade union, to registered trade unions and employees not in trade unions. Based on the same evidence by DW at page 12 all the

procedures in section 38 (b)(c) and (d) were all blanketed in the meeting of 8/2/2017. The said meeting is the one which is supported by Exhibit U1.

This fact is also reflected in the CMA award where at page 12 of the award it states that the CMA is satisfied that all procedures were followed by the applicant. The main basis of this conclusion by the arbitrator is Exhibit U1 which is the list of the employees, including the applicants, who attended the meeting of 8/2/2017.

By examining the contents of exhibit U1, in this meeting the both applicants' names appear in the list of attendance attached.

The question is, was that Exhibit U1 enough to establish that the applicant termination was fair procedurally? In their affidavit the applicants contest to have attended the said meeting as they have not signed the **Exhibit U1**.

The respondent testified that all retrenchment procedures were followed including a meeting with employees and later a meeting with Workers Union. That retrenchment followed LILO, LIFO and performance of the employees. However, there was no documents to support his testimony.

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There is no evidence of procedure of selection for retrenches and a signed agreement for retrenchment. The respondent did not establish before the CMA which criteria were used to retrench the applicants among the one provided by the law.

We are told that the applicant Mustafa Mrope was offered another job but he refused it. There is no proof to this statement as well.

Disclosure of information and consultation was an important stage before retrenchment. In the case of **Omary Ali Dodo v Air Tanzania Company Limited,** Lab. Rev. No. 322/2013 this Court quoting the South African Case of **Visser v Sanlam** [2001] 22 ILJ 666 it stated that the word consultation is not defined in the ELRA, but a good definition of the term can be derived from Labour Appeal Court of South Africa (where our labour laws are in *parimateria* with the Labour laws of South Africa).... Consultation ***in totidem verbis*** (in many words) that.... "*the employer and the other consulting parties must engage in a meaningful joint consensus seeking process and attempt to reach consensus.... For the process to be meaningful it must not be a mere sham a going through the*

motions. The employer must consult in good faith in that it must not have made up its mind prior to consultation to dismiss."

The case of **Moshi University College of Cooperative and Business Studies (MUCCOBS) v. Joseph Ruben Sizya,** Lab. Div, DSM Rev. No. 11 of 2012 insisted for the employer to follow the required procedures for retrenchment.

It is this Court's view that the prior to their retrenchment, the applicant were not involved and consulted as provided for in section 38 of ELRA. Therefore, the procedure for termination was procedurally unfair.

The second limb of the first ground is whether termination was substantively fair. I have carefully gone through the CMA proceedings and award it was in evidence that the 1st applicant Mustapha Mrope was operational officer knew all the stations which were the clients of the respondent and that it is not true that the respondent had lost big clients like Oryx and MSD which led to less working stations. The applicant Mustafa Mrope explained that he was the one who was distributing the guards/watchmen into all the stations and he know all the stations, there is no station which was closed.

The applicants stated that they were terminated because they were Union Leaders and they had previously issued a letter expressing weakness of the Respondent's administration something which was not of interest to the Respondents. The said letter was tendered as **Exhibit A3**.

The respondent did not dispute that both applicants were Union leaders. He testified that retrenchment followed LILO, LIFO and performance of the employees. However, there was no documents to support his testimony. He only tendered copies of Minutes and the list of employees which attended the meeting of 82/2017 as **Exhibit U1**.

The respondents have explained that termination was necessary due to operational requirement. That they have lost a number of big working stations that is why they do not need a high number of employees. In cross examination he was asked if he has any proof to show that the respondent has ended its business with "MSD" and "Oryx" the respondent did not have any.

Unfortunately, the evidence in record do not contain any documents to support the respondent's statements. The respondent was expected to support his allegation with copies of expiry of the said contracts with MSD

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and Oryx. This evidence was important especially because the applicants had stated that they were being terminated because they were Union leaders and they were reporting matters which the employer was not happy with.

In any proceedings concerning unfair termination of an employee by an employer the employer shall prove that termination was fair. This was held in a number of cases including **Muhimbili National Hospital v. Constantine Victor John,** Civil Appl. No. 44/2013.

The applicant also states that as they were Trade Union leaders they should have been last people to be terminated. There is no dispute that the applicants were Trade Union Leaders however, there is no law which requires the employer to terminate the Union leaders as last persons but the first to be employed should be the last to be terminated except when the said person has incompetency or low capacity.

The second issue of 2 different arbitrators handling the same arbitration.

In **M/S Georges Centre Limited v. The Honourable Attorney General & Another,** Civil Appeal No. 29 of 2016, the Court considered the

similar situation and it was held that a case can be heard by 2 different magistrates. However, the judicial officer who takes over the case must record the reasons for taking over a case which is partly heard by another. In the absence of the reasons the succeeding judicial officer lacks jurisdiction to proceed with the trial.

In the 1st page of the award the Arbitrator has explained that he had taken over the partly heard case because Hon. Makanyaga is on study leave. This is being said there is no injustice which was occasioned by the matter being heard by 2 Arbitrators.

The evidence on record shows that there is no proof whether the respondent lost business to initiate retrenchment proceedings; and that there is no evidence that the respondent adhered to retrenchment procedure before terminating the applicants.

On that basis, termination of the applicant was unfair substantially and procedurally.

I do not fault the decision of CMA that the applicants should be paid notice and severance allowance. Further to that, as the termination was

unfair both procedurally and substantively, the respondent is ordered to pay each applicant a compensation of 48 months' remuneration.

It is so ordered.

L.J. Itemba
JUDGE
02/07/2021

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