IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 657 OF 2019

EFC (T) MICROFINANCE BANK LTD.....APPLICANT

VERSUS

HELLEN SABUNI.....1st RESPONDENT

JULIETH MCHUNGUZI.....2nd RESPONDENT

LILIAN KAMALA.....3rd RESPONDENT

(From the decision Commission for Mediation & Arbitration of DSM at Kinondoni)

(Katto: Arbitrator)

dated 10th September 2018

in

Labour Dispute Na. CMA/DSM/KIN/R.1092/16/02

JUDGMENT

29th September & 13th October 2021

Rwizile J.

This application is for revision, where the applicant challenges the decision of the Commission for Mediation and Arbitration. It is filed under section 91(1)(a), (2)(b)(c) and Section 94(1)(b)(i) of the Employment and Labour Relations Act, Rule 24(1), (2)(a), (b), (c),

(d), (e) and (f) and (3)(a), (b), (c) and (d) and Rule 28(1)(c)(d) and (e) of the Labour Court Rules, GN No. 106 of 2007.

It is, as well, supported by an affidavit sworn by one Ahmed Ramadhan, asking this court to mainly revise the decision of the CMA in Labour Dispute No. CMA/DSM/KIN/R.1092/16/02.

At the hearing of this application before this court, Mr. Steven Mayombo learned advocate, who represented the applicant had two points to argue;

(i) Whether the arbitrator properly evaluated evidence on termination of the respondent and

(ii) Whether it was proper, having found that termination was not fair, to award 15 months' salary as compensation.

Albeit brief, the record shows, the applicant is a bank doing business in Tanzania. It happened however, that its business did not proceed as required. In 2014, the Bank of Tanzania, which regulates banking business, informed the applicant to have got loss. The applicant was therefore directed to effect some measures to have business properly progressing. The respondents, being its employees were retrenched on operational requirements in the year that following. They were however not satisfied with the manner the exercise was conducted

and so filed a dispute with the CMA. Their main claims were, payment of compensation for unfair termination.

Upon hearing the dispute, the Commission was of the opinion that the respondents were unfairly terminated. It awarded each of them, the amount of 7,888,395/= as compensation for 15 months salaries. This, irritated the applicant and hence this application.

As shown before, applicant has been represented by Mr. Steven Mayombo learned advocate. He argued that based on the BOT report of 2015, exhibit D2, the applicant was operating under loss.

This situation led to retrenchment properly conducted as under Rule 23 of the Code of Good Practice, GN No. 42 of 2007. According to him, therefore was sufficient and proved valid reason for termination.

On the second point, the learned counsel argued that there was no justification for awarding 15 months' salary as compensation. It was stated that there was evidence proving termination was preceded by meetings for consultation as the award shows. In his view, since termination was on operation requirement, it was therefore proper as per evidence of Dw2. He said, since it was proved that there were sufficient reasons for retrenchment, then terminal benefits awarded

were in accordance with the law and so there was no reason to award them 15 months on top of what was given already.

Arguing for the respondent, Mr. Sabasi Shayo, learned counsel, was of the view that retrenchment for operational requirements was not proved. It was his view that the alleged BOT report did not prove the applicant operated the banking business under loss, since that can be proved by internal bank mechanisms. According to the learned counsel, if the applicant operated under loss, it could be impossible to be upgraded from a micro-finance into a bank. It was said that basing on the year that termination was done there was no reported loss. The report by the BOT was dealing with the previous years. Mr. Shayo submitted further that exhibit P3, P6 and P7 which are termination letters contained different reasons for termination as stated in their certificates of good service.

On the second issue, the learned counsel was of the opinion that the respondents were not informed about the retrenchment exercise. The meeting stated was for that reason, mainly introduced the management and it hardly discussed retrenchment. He said retrenchment did not comply with the law as per section 38 of the ELRA and rule 23 of the Code of Good Practice GN. 42 of 2007. To

show that termination was for reasons other than operational requirement, it was argued, three months later, the same posts were advertised and the respondents were not considered first. He said, it was contrary to rule 25 of the Code, as testified by the respondents. The learned advocate cited, the case of **Mbeya Cement Co Ltd vs L. Mwankunya,** Rev No.20 of 2011, [2011-2012] LCD1, 75, **Said Muhamed Ngereze vs AAR LB International**, and **Alliance One Tobacco vs George Msingi,** 77 [2011-2012]1 158, to support the payment of 12 months compensation.

By way of rejoinder, Mr. Steven was of the submission that the BOT supervises all banks, and so proved the applicant operated under loss. And that the meetings held made discussion on the economic status of the Bank. He therefore asked this court to allow this application.

Having considered the rival submissions by the learned counsel, I have to start dealing with the issue whether retrenchment for operation requirement was proved. It is an established principle of law that, termination of employment or retrenchment must be based on a valid reason and in accordance to the stipulated procedures.

For a retrenchment exercise to be substantively and procedurally fair, the employer has to comply with the provisions of section 38 of ELRA and Rule 23 of the ELRA (Code of Good Practice) GN 42 of 2007. Section 38 (1) provides as hereunder;

"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.

Fairness stated here must be both, termination grounded on reason and procedural aspects. To be able to appreciate that, the rules are clearly stipulating exactly how to prove so. This is in accordance to rule, 23 of the Code of Good Practice. It states as hereunder;

"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 affected.

(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.

It is the duty of this court therefore to impeach the existing evidence to see if the law was met.

The law has clearly placed this duty on courts because if let to employers, retrenchment may be conducted at the employer's whims and for flimsy reasons. The applicant has submitted that she had reasons to do what she did. I have visited the record. Evidence shows, the report from the central Bank showed there was a loss. It was in the year 2015 and I think it mirrored the situation before and

during the same year. From the recommendations, the applicant is alleged to have implemented a retrenchment. I have to say, the report indeed showed the bank got a loss. The recommendation showed there was management gap in running the bank. It may seem, the stated loss was actuated by poor management and not finance crisis.

I agree with Mr. Sabasi therefore that there was no proof that the bank was in dreadful need to retrench. So, taking section 38 by its letter, one would wonder, if the two meetings referred were called for retrenchment purposes. In exhibit D2, the meeting discussed issues other than retrenchment. It is not therefore true that the respondent was through this meeting informed of the exercise. It is apparent that there was no proper consultation. Since the duty to prove fairness of termination is cast on the employer. I hesitate to hold that the same was discharged. All said and done, I agree with the respondent that termination was not fair in both aspects.

As to whether, reliefs were in accordance with the law, I agree that compensation upon unfair termination is governed by the law. Section 40(1) (c) provides for compensation for a period not less than 12 months.

But subsection 2 of the section is clear that 12 months compensation is not a substitute of what is an entitlement due to an employee upon termination. To the contrary, it is in addition to other due terminal benefits. The test placed here is if termination was valid, but lacking in terms of procedure. In this case, the Commission rightly came to the conclusion that retrenchment was not grounded on reason and the procedure was not followed. This means, the arbitrator was justified to order compensation of 15 months salaries on top of the benefits already given to them. For the foregoing reasons, this application lacks merit, it is dismissed. Since this is a labour dispute, I dispense with an order for costs.

A.K.Rwizile

JUDGE

13.10.2021