IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 527 OF 2020

NEWTON T HONGOLI..... APPLICANT

VERSUS

SILVERSANDS INVESTMENT LTD..... RESPONDENT

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

(Lyimo : Arbitrator)

dated 6th November 2020

in

CMA/DSM/ILA/R.929/17

JUDGEMENT

10th February & 1st March 2022

Rwizile, J

This is an application for revision. It is set to challenge the decision of the Commission for Mediation and Arbitration. As it is usually the case, it is commenced by the notice of application. The chamber summons is filed under relevant provisions of Labour Court Rules and the Employment and labour Relations Act. It is also supported by the affidavit sworn by the applicant Newton T. Hongoli. The 13-paragraph affidavit filed on 15th December 2020, provides at paras 10 and 11 legal issues to be

determined. For avoidance of doubt and for ease reference the same are coached as follows;

i. ***Paragraph 10:*** *That the arbitrator erred in law and fact in dismissing the dispute with disregarding that the respondent failed to make adherence of the legal procedures upon the termination by operation requirement*

ii. ***Paragraph 11:*** *That the Arbitrator erred in law and in fact in issuing the award in favour of the respondent while there was no any agreement reached by the parties for retrenchment.*

Facts that paved the way to their dispute can be stated that; the applicant was employed as a technician by the respondent. His contract of employment entered on 1st November 2016 was of unspecified period of time. Nearly one year thereafter, the respondent is alleged to have experienced business huddles that led him to contemplate retrenchment of some workers. Therefore, the applicant was terminated by a letter dated 19th July 2017. The applicant was paid terminal dues to include; a salary of July 2017, one month salary as a notice, 2017 annual leave, severance pay, gratuity and a certificate of good service.

Sometimes later, the applicant was not happy with the retrenchment process. He filed a dispute at the Commission claiming for unfair

termination. Upon hearing the claims, the Commission dismissed his claims. Not satisfied with the action of the Commission, he has filed this application.

The applicant appeared in person and also appeared to have drafted all necessary pleadings. The respondent was represented by Ibrahim Shineni learned advocate of Law Domain Advocates. Happily, the application was heard in form of written submissions at the instance of the applicant.

I have read the submissions of the parties. The centre of the dispute in their submissions is whether retrenchment procedures were adhered to. It is important to note here that the applicant's submission in chief and the reply thereto did not deal with the two issues raised in paragraphs 10 and 11. Instead, it is clear that the same has argued issues allegedly raised in paragraphs 13 and 14, of the affidavit which do not exist. Paragraph 13 of the affidavit is dealing with reliefs, when in fact as shown before, the affidavit supporting this application has 13 paragraphs only. This in my view, renders the submissions of the applicant, in material terms with little substance. Even though the applicant's submission is not paginated but at the second page of the submission in chief, the applicant appears to argue an issue at para 13. It states thus; *the arbitrator erred in law and in fact by issuing the award in favour of the respondent while*

legal procedures were not followed by the respondent upon the termination on operational requirement.

All in all, despite being a different coached point, still it does not render the argument nugatory, as long as the same is centred on termination procedure by way of retrenchment. This means, his impeachment on the procedure is styled in failure to comply with section 38 (1) (a) to (d) of the Employment and Labour Relations Act and Rules 23 -24 of Code of Good Practice, GN No 42 of 2007. In here, he said, there was no consultation meeting, since what was so alleged was attended by three people. He also sought support in the case of **Oil Gas & Marine (T) Ltd vs Jovent Mushwaimi and 19 Others,** Revision No. 293 of 2016. (HC) Unreported.

Of course, these points were disputed by the respondent in the submission, where it was submitted that the applicant did not prove his case based on evidence. It was argued, the applicant did not make use of section 110 and 111 of the Evidence Act.

According to the respondent, the applicant was charged with the duty to prove his case, which he failed. As well, the respondent's support was sought in the case of Rashid **Abiki Nguwa vs Ramadhani H Kuteya vs NMB PLC,** Civil Application No. 431 of 2021, CA (Unreported). Further,

he also took pleasure in the case of **Oil Gas & Marine (T) Ltd (supra)** to support the fact that section 38 of the ELRA and Rules 23-24 of the GN No. 42 of 2007 were complied with. It was submitted, the procedures stated in the rules should not be applied in a checklist. He therefore asked this court to dismiss this application.

When rejoining, the applicant was clear that section 38(1)(d) (iii) was not complied with since there was no consultation meeting of all employees but three of them.

Having considered the submissions, I think, it is vivid in the record that the applicant was terminated on 19th July 2017, as referred by exhibit SS3. The applicant therefore was retrenched. Retrenchment as it has been argued may be done for reason of operational requirements. However, the term refers according to section 4 of the ELRA and rules 23(1) of the Code of Good Practice, (GN No.42 of 2007) to be based on, economic, structural, technological or similar needs of the employer. But for retrenchment to hold, three principles as per section 38(1) must be met namely, **one,** give notice of intention to retrench. The notice, it has also been stated should be sufficient and be supplied to the workers. **Two,** disclose all relevant information for the intended retrenchment. This stage is important because it lays a good ground for the **third** step which is

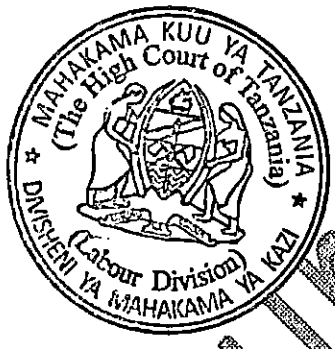
consultation. Consultation stated here should not only be done to the intended employees, but also to the trade union registered at the work place if it exists.

In doing so, reasons for the exercise must be stated, measures taken to minimize the intended retrenchment should be spelt out as well. Other things to be considered include mode of selection of the employees to be retrenched, timing of the same, as well as the possibility of paying severance payment.

Going by the record, it has been shown that the applicant complains of failure of the respondent to observe rules of retrenchment. In essence, it is common ground that the retrenchment procedure stated under section 38 and rule 23, cannot be applied verbatim. What is the spirit and letter of the law, is that the procedure must be fair and grounded on reason. The commission held; the procedure was fairly done. Indeed, the respondent based on the available evidence showed there was an economic need to retrench. The notice was given and consultation meeting conducted. Although the applicant admits there was a form of consultation, he disputes the fact that the same could not be done to three people. In my considered opinion, consultation done in the matter

at hand was enough to offer sufficient information needed to the applicant. The law was therefore complied with.

Holding so, means, there was valid reason for termination. In evaluation, the procedure was as well followed. In fine, it is enough to answer the two issues, in the negative. I agree with the respondent that the commission rightly held that the procedure was fairly done. For the foregoing reasons, this application has no merit. It is therefore dismissed with no order as to costs.



A.K.Rwizile

JUDGE

01.03.2022