IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 161 OF 2022

(Arising from an Award issued on 29th April 2019 by Hon. Kachenje, J.J.M , Arbitrator, in Labour dispute No. CMA/DSM/KIN/R.1006/2017)

ALEXANDER BONIFASI MASASI & 2 OTHERS ..... APPLICANTS

VERSUS

BELGIUM DEVELOPMENT AGENCY ..... RESPONDENT

JUDGMENT

Date of Last Order:17/10/2022
Date of Judgment: 09/11/2022

B.E.K. Mganga, J.

On 28th December 2004 the herein applicants secured employment with the respondent as Security guards. They worked for the respondent until on 28th December 2017 when respondent terminated their employment allegedly due to operational requirements. It was alleged by the respondent at the time of terminating employment of the applicants that numbers of donors declined, as a result, she was forced to relocate the office to a cheaper place so as to reduce operational costs. It was alleged that in order to reduce costs, respondent relocated

to a new building where security services were provided by the landlord hence, service of the applicants were no longer required.

Aggrieved with termination of their employment, on 31st August 2017 applicants knocked the door of the Commission for Mediation and Arbitration (CMA) claiming that their employment contracts were unfairly terminated by the respondent. At CMA, applicants prayed to be paid one month salary in lieu of notice, 5% of month salary, unpaid annual leave, twelve (12) months' salary as compensation for unfair termination, handshake bonus, overtime, worked days and certificate of service.

After hearing evidence of both parties, arbitrator issued an award that claims by the applicants were not substantiated because termination was fair, that the claims for extra duty were time barred and that they were not entitled to be paid extra duty. The arbitrator therefore dismissed dispute filed by the applicants. Applicant felt unhappy with the award and decided to file this application for revision. In their joint affidavit in support of the Notice of Application, applicants raised three issues namely:

i). Whether it was proper for the arbitrator to hold that termination was fair.

ii). Whether applicants are not entitled to be paid extra duty pay and

iii). Whether claim for extra duty was time barred.

In resisting the application, respondent filed the counter affidavit of Peter Severin Mhuwa her Administrative and Finance Officer.

When the application was called on for hearing, Mr. Saulo Kusakala, learned advocate appeared and argued for and on behalf of the applicant while Ms. Flora Jacob, learned advocate appeared and argued for and on behalf of the respondent.

Arguing the application in support of the application, Mr. Kusakala, submitted on the 1st issue that it was testified by the respondent that she terminated applicants due to economic hardship because donations from donors declined. Counsel argued that it was not proved how respondent was in economic hardship because there is no proof that number of donors declined. Counsel argued further that, respondent was supposed to tender audited financial report or other proof showing that donation declined to prove reasons for retrenchment. But during submissions and upon being probed by the court, he conceded that it is not a requirement of the law that an audited financial report must be tendered to prove economic hardship. In his submissions, though counsel for the applicants conceded that evidence shows that respondent moved to the building that is less expensive and that

services of the applicants were no longer required, he insisted that there was no valid reason for terminating employment of the applicants.

On procedural aspect, Mr. Kusakala submitted that Section 38 of Employment and Labour Relations Act[Cap. 366 R.E. 2019] and Rule 23 of Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007 provides the procedure for retrenchment and that respondent did not comply with that procedure at the time of retrenching the applicants. He contended that respondent did not call applicants to the consultation meeting, that there was no consultation meeting that was held and no agreement was reached by the parties.

Counsel for the applicants submitted further that, at CMA, respondent tendered a Police loss report showing that consultation meeting minutes got lost. He argued that, in the award the arbitrator in considered the said police loss report. He added that the said Police loss report relates to Peter Mhuwa who lost his property and does not show that documents of the respondent got lost. Counsel argued that if at all minutes got lost, respondent was supposed to invoke Rule 27(1) of the Labour Institutions (Mediation and Arbitration)Rules, GN. No. 64 of 2007 to require applicants to produce. Mr. Kusakala went on that, the Police

loss report was used to circumvent the provisions of Rule 27(1) of GN. No. 64 of 2007(supra).

Mr. Kusakala submitted further that no notice of termination of employment was issued by the respondent as required by Section 41 of Cap. 366 R.E. 2019 (supra). He added that applicants were not offered an alternative job because respondent had various projects within the country. For all these he concluded that, termination was unfair both substantively and procedurally and that Arbitrator misdirected himself in holding that applicants did not prove their claims while the duty to prove lies to the employer as per Section 39 Cap. 366 RE. 2019(supra).

Submitting on the 2nd issue, Mr. Kusakala argued that applicants were not paid extra duty pay for a long period almost for 15 years. he went on that it was evidence of Peter Mhuwa (DW1) for the respondent that applicants worked for twelve hours. Based on evidence of DW1 that applicants worked for twelve hours, kusakala cited section 19(2) of Cap. 366 R.E. 2019(supra) and argued that the said section requires an employee to work for nine (9) hours only and that since they worked beyond nine hours they were entitled to be paid extra duty pay. Counsel for the applicant submitted further the Arbitrator erred to hold that claim for extra duty was out of time while on 23rd November 2017,

condonation was granted hence the issue of time limitation was irrelevant. When asked by the court to read what was indicated by the applicants in the CMA F2 while applying for condonation, upon reflection, he conceded that in CMA F2 applicants indicated that they were late for four months but their claims for extra duty is for 15 years. In short he conceded that the claimed extra duty was not condoned. Counsel for the applicants further submission that, while still at work, applicants discussed with respondent to be paid extra duty as evidenced by exhibit AM1 collectively. He was quick to submit that there was continuous breach hence they were entitled to be paid extra duty pay. But when probed by the court and upon reflection, he conceded that the issue that there was a continuous breach was not advanced at CMA.

In response, Ms. Jacob, Advocate for the respondent, submitted that termination was fair both substantively and procedurally. She argued that section 37(2)(b)(ii) of Cap. 366 R.E. 2019 (supra) allows termination based on operational requirements. She went on that, DW1 testified that there was decline on numbers of donation that caused respondent to be into economic difficulties hence a need to reduce of operational costs. She emphasized that, based on that, respondent moved to a cheaper office where there was no need of service of the

applicants because their service was provided by the new landlord. She insisted that the respondent complied with Rule 23(2)(a) and (c) of GN. No. 64 of 2007(supra).

Further to that, Ms. Jacob contended that DW1 was not cross examined on decline of donors. Responding on failure of the respondent to submit financial statement, Ms. Jacob submitted that financial statements are confidential documents that cannot be exposed to every person. She added that it is not a requirement of the law that financial statement must be tendered as a proof of economic hardship of the employer.

As regard to procedure for retrenchment, Ms. Jacob submitted that respondent complied with the law. She went on that applicants were served with notice (exhibit BTC 1), they were consulted in two meetings namely on 20th December 2016 (exhibit BTC 2) and on 14th February 2017. She added that, alternative measures to avoid retrenchment was difficult because service of the applicants was not needed in Dar es Salaam. In other areas out of Dar es Salaam there was no vacant.

As regard to the issue of notice to produce, learned counsel for the respondent submitted that it was not possible to require applicants

to produce because that would have shifted the burden of proof to the applicants.

Concerning the claim of overtime, Counsel for the respondent submitted that applicants are not entitled because claims were time barred and were not proved. She submitted further that; applicants failed to state total number of hours worked for as overtime. She added that in their CMA F1, applicants did not claim for extra duty arrears, rather, their claims were on unfair termination. She added that condonation that was granted is in respect of termination claims and not extra duty pay. Counsel referred the court to the case of ***Emmanuel Mahanda vs. BV-USC Tanzania Limited,*** Revision No. 294 of 2019, HC (unreported) and ***KUWASA vs. Simon Maduka***, Revision No. 67 of 2019, HC (unreported) to support her submissions that applicants had a duty to prove claims of overtime and that the said claims were supposed to be filed in time. She submitted further that applicants were paid extra duty pay in their monthly salaries as it was testified by DW1 and reflected in salary slip(exhibit AM1) that was tendered by PW2.

In a brief rejoinder, counsel for the applicant submitted that respondent had a duty to prove that termination was fair but she did

not. On extra duty, counsel reiterated his submissions that applicants were entitled and that breach was continuous.

I have considered rival submissions made by counsels and evidence in the CMA record and wish to first to determine the first issue namely whether, termination was fair or not. I am of the view that this is the most crucial issue in the application at hand. This is because it was submitted on one hand on behalf of the applicants that termination was unfair but in the other hand it was submitted on behalf of the respondent that termination was fair. In order to resolve this issue, I found it imperative to scrutinize evidence of the parties in the CMA record to see whether there was valid reason for retrenchment and whether procedures were adhered to or not. I am of that view because in termination on operational requirement the most important issue to be answered is whether there were genuine reasons to justify termination or it was just a pretext. See the case of ***Bakari Athumani Mtandika vs. Super doll trailer Ltd,*** [2014]LCCD 1 No. 90.

I have examined the CMA records and find that reason for retrenchment of the applicants as testified by Peter Severin Mhina (DW1) was the decline of the number of donors which caused respondent to experience economic difficulties, consequently, she

relocated the office to a cheaper building to meet the operational costs. It was further evidence of DW1 that in their former office that was situated at plot No. 1271 Masaki (Haile Selassie Road) which was a stand-alone house, respondent was paying USD 6000 as rent per month but in the new office she is paying USD 3000 per month. DW1 testified further that in the new office security services were provided making positions of the applicants became redundant. Evidence of DW1 was not challenged by both Theodos Charles Mpembwe(PW1) and Alexander Boniface(PW2) the only witnesses for the applicants. In fact, in his evidence in chief, PW1 testified that they were terminated on 28th February 2017 because respondent informed them that she was shifting to another office where their services were not needed. DW1 tendered final computation package as exhibit BTC-3 without objection. It was further evidence of DW1 that applicants were paid their retrenchment package. It is therefore my firm view that, since evidence of DW1 was not challenged, I hereby hold that respondent had valid reason to terminate employment of the applicants hence termination was fair substantively. It is my view that having received retrenchment package, it was not further open to the applicants to file the dispute at CMA challenging their termination. Having received retrenchment packages,

applicants were estopped to deny the truth thereof. See the case of ***Getha Ismail Ltd v. Soman Brothers*** [1960] EA 26 and ***Ngaile v. National Insurance Corporation of Tanzania Ltd*** [1973] EA 56, ***Denis s/o Magabe vs Republic***, Criminal Appeal No. 7 of 2010 [2011] TZCA 45, ***Bytrade Tanzania Limited vs Assenga Agrovet Company Limited & Another,*** Civil Appeal No. 64 of 2018 [2022] TZCA 619, ***Trade Union Congress of Tanzania (TUCTA) vs Engineering Systems Consultants Ltd & Others***, Civil Appeal No. 51 of 2016 [2020] TZCA 251, ***Muhimbili National Hospital vs Linus Leonce***, Civil Appeal No. 190 of 2018 [2022] TZCA 223. In ***TUCTA's case*** (supra) the Court of Appeal quoted an Article by Shreya Dave titled The Doctrine of Promissory Estoppel where the author wrote:-

> *"The true principle of promissory estoppel is where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact acted upon by the other party the promise would be binding on the party making it and he would not be entitled to go back upon it"*

Having quoted the said Article, the Court of Appeal went on that :-

> *"Under the Evidence Act, Cap 6, R.E. 2019, there is a provision relevant to the above doctrine, and that is section 123 which provides;*

'123. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing".

The Court of Appeal endorsed the decision of the High Court of Kenya in the case of ***Nairobi County Government v. Kenya Power and Lighting Company Limited*** [2018] eKLR wherein it was held that:-

"Upon applying the law to the facts of this case, I find that in the circumstances of this case, the doctrine of estoppel applies against the Petitioner. The Petitioner is estopped by the said doctrine from turning around and reneging on what it had agreed and committed itself into and even performed its part of the agreement. The Respondent in reliance to the agreement and commitment not only agreed to the arrangement and acted in reliance of the same".

The Court of Appeal concluded by holding that:-

"We are similarly of the view that the overt conduct and expressions of the appellant's predecessors during the signing of the contract and during the respondent's claims for payment, are binding on it"

Now, on the application at hand, applicants having agreed to retrenchment and having received retrenchment packages, they were estopped to challenge retrenchment process and package thereof. If they were dissatisfied with the retrenchment process, before agreeing to it and receive packages thereof, were supposed to file the dispute at

CMA in terms of section 38(2) of the Employment and Labour Relations Act[cap. 366 R.E. 2019].

On fairness of procedure, it was evidence of DW1 that applicants were served with notice, consultation meeting was held on 20th December 2016 and that applicants were informed the reason for the meeting, that applicants accepted retrenchment packages after agreement was reached. DW1 tendered final computation package as exhibit BTC-3 without objection. It was further evidence of DW1 that applicants were paid their retrenchment package. In his evidence, Alexander Bonifasi(PW2)testified *inter-alia* that consultation was done and that consultation meetings were held. It is my view, that procedure was adhered to. More so, having received retrenchment packages, applicants were estopped to deny that procedure for retrenchment were not adhered to.

On claims for extra duty pay, Theodore Charles Mpembwe(PW1) testified while under cross examination that they don't have proof that they worked for overtime or extra hours for them to be entitled to be paid extra duty pay and that there was no agreement with the respondent for the applicant to work for extra hours. It is my view therefore that the arbitrator was justified to hold that the claims for

extra duty pay were not proved by the applicants and rightly dismissed those claims.

In his evidence, Pw1 testified that the claim for overtime was for 15 years worked with the respondent. In the application for condonation, applicants indicated that the dispute arose on 14th March 2017 and that they were late for four (4) months. Again, in the affidavit in support of the application for condonation that was deponed on 24th August 2017 by Alexander Bonifasi, applicants did not state that their claims is for 15 years. It is my view that condonation was granted only for four months' indicated in the application for condonation Form (CMA F2) and not for 15 years. It is my views therefore that applicants were bound by their own pleadings and they were not supposed to depart therefrom as it was held in the case of ***George Shambwe v. AG and Another*** [1996] TLR 334, ***The Registered Trustees of Islamic Propagation Centre (Ipc) v. The Registered Trustees of Thaaqib Islamic Centre (Tic)***, ***Civil Appeal No. 2 of 2020*** ,CAT (unreported), ***Yara Tanzania Limited V. Ikuwo General Enterprises Ltd***, Civil Appeal No. 309 of 2019,CAT, ***NBC Limited & Another vs Bruno Vitus Swalo***, Civil Appeal No. 331 of 2019 [2021] TZCA 122, ***Barclays Bank (T) Ltd vs. Jacob Muro,*** Civil Appeal No.

357 of 2019 (unreported) and in ***Astepro Investment Co. Ltd v. Jawinga Company Limited***, ***Civil Appeal No. 8 of 2015,*** CAT (unreported). In the ***IPC's case,*** supra, the Court of Appeal held that: -

> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings .... For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties.*

In ***Yara Tanzania Limited case*** (supra) the Court of Appeal quoted its earlier decision in ***Barclays Bank (T) Ltd vs. Jacob Muro,*** Civil Appeal No. 357 of 2019 (unreported), that:-

> *"We feel compelled, at this point, to restate the time-honored principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored- See* ***James Funke Ngwagilo v.Attorney General*** *[2004]T.L.R. 161.See also* ***Lawrence Surumbu Tara v.Hon.Attorney General and 2 Others,*** *Civil Appeal No.56 of 2012; and* ***Charles Richard Kombe t/a Building v.Evarani Mtungi and 3 Others****, Civil AppealNo. 38 of 2012 (both unreported)".*

Applicants were bound by their pleadings in the CMA F1. Their claim of 15 years overtime was not condoned hence they were time barred. The arbitrator was right in dismissing those claims for being time barred.

For all discussed hereinabove, I hold that the arbitrator was justified to dismiss the dispute filed by the applicants. I therefore uphold CMA award and dismiss this application for being devoid of merit.

Dated in Dar es Salaam on this 09th November 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 09th November 2022 in chambers in the presence Saulo Kusakala, Advocate for the applicants and Flora Jacob, advocate for the respondent.

B. E. K. Mganga
JUDGE