IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 509 OF 2020

BETWEEN

FIVE STAR PRINTERS LIMITED ..... APPLICANT

VERSUS

NORASCO FRANCIS NORASCO & 5 OTHERS ..... RESPONDENTS

JUDGMENT

S.M. MAGHIMBI, J:

The applicants were aggrieved by the award of the Commission for Mediation and Arbitration ("CMA") in Labor Dispute No. CMA/DSM/ILA/171/2020/184 ("the Dispute"). They have lodged this revision under the provisions of Section 91(1)(a),(2)(b)&(c) and Section 94(1)(b)(i) of the Employment and Labour Relations Act, 2004, as amended ("ELRA"), read together with Rules 24(1), 24(2)(a),(b),(c),(d),(e),(f), 24(3)(a),(b),(c),(d), and Rule 28(1)(c),(d)(e) of the Labour Court Rules GN. 106 of 2007 ("the Rules"). The applicants moved the court to revise and set aside the whole of the award. They also prayed for any other relief that the court may deem fit and just to grant. In

particular in their Chamber Summons, the applicant moved the court for the following orders:

1. That, this Honorable Court be pleased to revise and set aside Arbitration proceedings and Award issued by Hon. Mourice Egbert Sekabila Arbitrator in the Commission for Mediation and Arbitration on the 20th day of November 2020 in Labour Dispute No. CMA/DSM/ILA/17/2020/184 make an order quashing the award given therein.
2. That this honorable court be pleased to grant a declaratory order that the proceedings and Award against the Applicants was obtained illegally, incorrectly and based on bias.
3. The Honorable Court may be pleased to give such further and other Orders as it deems appropriate in the circumstances.

The respondent opposed the application praying for its dismissal. Hearing of the application proceeded by written submissions. The applicants were represented by Mr. Christine Walala, learned advocate while the respondent was represented by Mr. Fundikira, learned advocate.

The historical background of the dispute is that the respondents were employed by the applicant on different dates as follows:

(a) The 1st respondent Norasco Francis Norasco who was employed on the 24the day of October, 2018 in the packing department.

(b) The 2nd respondent Daudi Maulid Uranga who was employed on the 1st February 2015 in the packing department.

(c) The 3rd respondent Ally Yahya who was employed on the 1st day of February 2014 in the packing department.

(d) The 4th respondent Diomedes F. Lutaingulurwa who was employed on the 1st day of August 2019 in the packing department.

(e) The 5th respondent Abdul Feriji who was employed on the 24th day of October 2018 in the packing department.

(f) The 6th respondent Omary Ally Npatahole who was employed on the 23rd day of February 2018 in the packing department.

All respondents' employment contracts came to an end on the 24th day of February 2020 through what the applicant alleged to be a retrenchment exercised by the management a week before 24th February 2020, due to operational requirements situations that led to economic depression of the Applicant's business. Aggrieved by the termination of the

contract, on 26th day of February 2020 the respondent in this application filed a dispute at the CMA, an award which is a subject of this revision. According to the Applicant, at the CMA the applicant's claims were as follows:

(a) Norasco Francis claimed for salary, notice, severance pay, days he worked, deductions and compensation.

(b) Daudi Maulid Uranga claimed for salary, notice, severance pay, days he worked, deductions, leave and compensation.

(c) Ally Yahya claimed for salary, notice, 15 days leave severance pay, days he worked, deductions and compensation.

(d) Diomedes pay, days he worked, deductions and compensation.

(e) Abdul H. Feriji claimed for salary, notice, severance pay, days he worked, deductions, leave and compensation.

(f) Omary Ally Npalahole claimed for salary, notice, severance pay, days he worked, deductions and compensation.

In the Award of the CMA, the applicant was ordered to pay the respondents the total amount of Tshs. 25, 920,000/= within (30) days

from the date of this award. The applicant legal issues on the impugned award are as follows:

a. That the arbitrator erred in law and in fact by bias evaluation of evidence and ignoring evidence adduced by respondent's witness at CMA who is the applicant in this application without any reasons.

b. That the arbitrator erred in law and in fact by disregarding statutory payments that were already made by the applicant in this application to the respondents.

c. That the arbitrator erred in law and in fact by deciding the matter out of merit he based decision on unfair termination and not retrenchment.

d. That the arbitrator erred in law and in fact by deciding the matter out of merit he based his decision on unfair termination and not retrenchment.

e. That the arbitrator erred in law and fact by making a bias decision on the order of relief that he made and that is ordering the applicant to pay a total of Tshs. 25,920,000/= as compensation not considering annexture A which was attached

in the CMA form number 1 filed by the respondents in this case claiming a total of Tshs. 19,961,366/= as compensation.

Having heard the parties in this revision, I find that the main issue for determination is whether the applicants were fairly terminated both substantively and procedurally. According to the applicant, termination of the respondent was a result of operational requirement due to non-performance of the company. The applicant challenges misapprehension of evidence by the arbitrator, deciding on the basis of unfair termination instead of retrenchment. She further challenge the arbitrator in awarding a total sum which was above what the respondents prayed for and lastly that the arbitrator disregarded the statutory payments already paid to the respondent by the applicant.

I will start with the issue of misapprehension of evidence claimed by the applicant. At this point, I gather is that Mr. Walala's claims is that the respondents were terminated due to operational requirements following poor performance of the applicant company. The issue is what the law says about such situation and whether, according to the evidence adduced during arbitration the respondent complied with the requirements of the law. The provision of law dealing with retrenchment is Section 38(1) of the Act which provides that:

(1) In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, he 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) 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 which members in the workplace not represented by a recognized trade union;

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

The first and most important aspect of retrenchment, according to the law, is the notice of intention to retrench (Sect. 38(1)(a)). This notice has to be in accordance to Section 38(1)(b) of the Act, which requires it to disclose all relevant information on the intended retrenchment for the purpose of proper consultation. There must also be consultations between the employer and employee (Section 38(1)(c). Since the applicant claims that the arbitrator misapprehended the evidence, my duty is to see whether according to the evidence adduced, she complied with that requirement.

During arbitration, the applicant had only one witness, Hamisi Sanane, a supervisor in the packaging department. His testimony was only to the effect that after facing economic hardship, the applicant decided to downsize her company. The respondents were given a notice of retrenchment and were paid their entitlements. He also testified that the decision to retrench the respondents was done by the management. The DW1 did not tender any notice to show that it was in compliance with the requirements of Section 38(1). The witness further admitted that the decision to downsize was done by the management and there is nowhere

that the respondents of Trade Union was involved. At this point, I see no evidence to show that the applicant complied with the procedure for terminating the applicants hence no misapprehension of evidence.

Mr. Walala also wishes for this court to make a finding that the arbitrator erred in deciding on the basis of unfair termination instead of retrenchment. I find the argument to be off the context because Section 39 of the Act puts a burden to the employer/applicant to prove that the termination was fair. Retrenchment is one of the forms/modes of termination hence the applicant was duty bound to prove that the termination of the respondents was fair on ground of operational requirements. Since the applicant failed to prove the fairness of the reason or procedure for termination, then the finding of the arbitrator would be nothing but that the applicants were unfairly terminated.

I will determine the last two grounds together, that the arbitrator erred awarding a total sum which was above what the respondents prayed for and lastly that the arbitrator disregarded the statutory payments already paid to the respondent by the applicant. Starting with the statutory payments, what the arbitrator awarded was compensation after having found that the termination of the respondents was unfair. The compensation is provided for under Section 40(1)(c) of the Act which

pursuant to Section 40(2) of the same Act, the compensation to be paid is in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement.

In this case, the applicant paid the respondents their entitlements at the exit point and pursuant to Section 40(2), the amount paid cannot be substituted by compensation paid after termination is found to be unfair under Section 40(1)(c) of the Act. Therefore there is no error committed by the arbitrator in awarding the compensation.

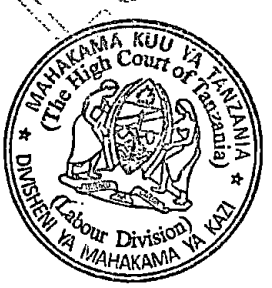
The last issue is that that the arbitrator erred by awarding a total sum which was above what the respondents prayed for. This took me back to the CMA Form No. 1 whereby I found an attachment A which outlines the claims of the respondents. Indeed as correctly established by Mr. Walala, the award of the CMA is beyond what was claimed for. I have noted that in awarding compensation, the arbitrator came up with issues that were not raised by the respondents during arbitration for instance; the issue on whether or not the respondents were the sole bread earners was never raised at the CMA. It appears that the arbitrator is also gender biased hence by seeing the respondents were all male, he made an assumption that they are the sole bread earners, with respect, the

arbitrator took off on a wrong footing by involving issues that were not tabled before him and considered them in awarding compensation.

It is also trite law that a litigant is awarded by the court that which he asked for and not more unless there are serious grounds to do so. That said, the award of the CMA is revised where the amount of compensation is concerned, the applicant shall pay the respondents the following compensations, Noresco Francis Tshs. 2,644,614/-, Daudi Maulid Uranga Tshs. 5,105,000/-, Ally Yahya Tshs. 4,840,960/-, Diomedes Lutaingurwa Tshs. 2,090,768/-, Abduli Feriji Tshs. 2,635,383/- and Omary Npalahole Tshs. 2,644,614/-. The total amount to be paid is therefore **Tshs. 19,961,339/-.**

On those findings, save for the varying of the amount of compensation to be paid, I see no reason to interfere with the remaining findings of the CMA. This revision is partly allowed to the extent explained.

Dated at Dar-es-salaam this 25th day of March, 2022



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S.M. MAGHIMBI

JUDGE