THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 380 OF 2020

BETWEEN

ECO BANK TANZANIA LIMITED ..... APPLICANT

AND

NGUNO SHABANI & 24 OTHERS ..... RESPONDENTS

JUDGMENT

Date of last Order: 09/03/2022
Date of Judgment: 31/03/2022

B.E.K. Mganga,J

Applicant was the employer of the respondents. Respondents were employed on divers' dates and positions. It happened that on 30th June 2017, applicant terminated employment of the respondents, allegedly, on operational requirement grounds. Respondent being aggrieved with the said termination(retrenchment), on 6th July 2017 they filed labour dispute No. CMA/DSM/KIN/R/768/17/745 before the Commission of Mediation and Arbitration (CMA) at Kinondoni. In the CMA F1, respondents showed that they were claiming to be paid severance pay, leave arrears, 13th cheque as per their contracts of employment, golden handshake arrears, compensation for 48 months'

renumeration, Fifty million to each respondent, as damage for tort suffered, overtime arrears, P.A.Y.E rate exceeding prescribed deduction and certificate of service.

On 19th April 2018, Hon. Alfred Massay, arbitrator, having heard evidence of both sides, issued an award that termination of the respondents was substantively fair because there was fair reason for retrenchment. Reasons advanced by the applicant for retrenchment were that (i) financial constraint because applicant was at risk to be placed under liquidation by the Bank of Tanzania as a result, she was supposed to reduce expenditure, (ii) technological advancement due to the digitalization and introduction of sim banking to enable customers to withdraw and deposit money through their mobile apps that reduced customers to be handled from 200 to 50 per day (iii) closure of Mtwara branch and min branch of Tall-Dar es Salaam due to under performance. But, the arbitrator found that termination was unfair procedurally because applicant did not comply with fair procedure of termination. The arbitrator found that consultation was not thorough, adequate, and meaningful. The arbitrator awarded each respondent be paid 12 months' salary compensation. The arbitrator found further that, severance and leave pay were improperly computed and therefore

ordered that, respondents were entitled to arrears claimed relating to severance and leave pay. Arbitrator made calculation as to severance and leave pay arrears each respondent was entitled to. In addition to the foregoing, the arbitrator ordered that respondent be paid 13th months' cheque.

Applicant felt resentful with the award thus she filed this application. The application was supported by the affidavit of Abdallah Kichui, the applicant's Human Resources officer who raised 6 grounds. In contesting the application, the respondents filed a counter affidavit affirmed by Nguno Shabani, their representative.

At the hearing, the applicant was represented by Ms. Miriam Bachuba, advocate who prayed to adopt the affidavit of Abdallah Kichui to form part of her submissions. In arguing the application, Ms. Bachuba, counsel for the applicant narrowed the grounds of revision into two i.e.; (1), Whether the arbitrators finding that terminal of the respondent was procedurally unfair, and (2) whether reliefs awarded were legally justified.

On the issue of procedural unfairness, counsel for the applicant submitted that, the arbitrator found that retrenchment procedure was not followed as respondents were not consulted. She argued that the

finding by the arbitrator is not legally justified because (i) the issue of consultation does not arise when parties has reached agreement as required by the law. That, according to exhibit. D4 and D5 parties reached an agreement on 30th June 2017.

Ms. Bachuba further submitted that, in terms of Section 38(1) of Employment and Labour Relations Act[Cap. 366 R.E. 2019] read together with Rule 23 (4) of Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007 provides for procedures to be followed under retrenchment. One of those procedures is consultation. That, consultations were conducted hence the law was complied. She submitted further that, in terms of Section 38(2) of Cap 366, if there is no agreement, the matter must be referred to CMA. she went on that in the matter at hand, consultation was done, and agreement reached and neither party referred the matter to CMA for Mediation as evidenced by exhibit D4 and D5. Counsel submitted that respondents were paid retrenchment package in June 2017. To bolster her arguments, she referred the case of ***Resolution Insurance Limited v. Emmanuel Shio and 8 others, Revision No. 642 of 2019*** where this court held that, once employees are dissatisfied with retrenchment, they are supposed to challenge at CMA before retrenchment is concluded. She

argued that in the application at hand, respondents knocked the door of CMA after the whole process of retrenchment.

Ms. Machuba contended further that, respondents were properly consulted as per exhibit D2 which is emails notifying them intention of retrenchment, exhibit D3 i.e. invitation to consultation meeting and D4 i.e. minutes of the consultation meetings which were signed by the respondents. She maintained that, as per exhibit D4 all requirement of the law were complied with by the applicant. To strengthen her submission, Counsel cited the cases of ***Mainline Carriers Ltd v. Delifrida Filbert Libeba & 7 others Revision No. 264 of 2019*** (unreported) where it was held that once minutes are signed, then consultation is complete. She further cited the case of ***Faraji Shambe & 13 others v. Zanzibar Telecom Limited, Revision No. 77 of 2020*** (unreported) that failure to file the dispute to CMA implies that the offer of retrenchment was accepted.

Furthermore, Ms. Machuba submitted that the arbitrator found that applicant did not tender the audited statement of account to show that she was in economic hardship. She argued that this finding was wrong because during consultation, respondents were informed of the financial status of the applicant. she stressed that absence of the

audited account did not prejudice the respondents. She referred the court to the case of ***Tanzania Building works Limited v. Ally Mgomba & 4 others Revision application No. 305 of 2010***, where it was held that employees had a duty to respond after being consulted by the employer.

Counsel for the applicant further criticized the arbitrator in holding that no consultation was made, and that names of employees to be retrenched were made prior consultation. Counsel argued that there is no law prohibiting employer to select employees to be retrenched. Counsel for the applicant cited Rule 24(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 and summitted that the said Rule requires employer to use fair and objective criteria in selection of employees to be retrenched. She argued that selection criteria were not disputed. She asserted that applicant was supposed to prove the case on the balance of probabilities and cited the Court of Appeal case of ***Paulina Samson Ndawavya v. Theresia Thomasi Madaha Civil Appeal No. 45 of 2017*** (unreported) arguing that the case was proved to the required standards.

Regarding the 2nd ground, i.e., on relief the parties the parties were entitled to, Ms. Bachuba, advocate, submitted that the relief that

was awarded to the respondents especially 12 months compensation is a discretion of the commission as per Section 40(1) of the Employment and Labour Relations Act [Cap. 366 R. E 2019] read together with Rule 32(5) of the Labour Institutions (Mediation and Arbitration s Guidelines) Rules, GN. No. 67 of 2007. She argued further that arbitrator was supposed to consider extent of unfairness of retrenchment. She went on that no reason was assigned by the arbitrator in awarding 12 months salaries compensation. To support her argument, she cited the cases of of ***Felician Rutwaza v. World Vision Tanzania Civil Appeal No. 213 of 2019*** CAT, (unreported) ***Sodetra (SPRL) Ltd v. Njellumezza & another, revision No. 207 of 2018*** and ***Vedastus Ntulanyeka & 6 others v. Mohamed Trans Limited, Revision No. 4 of 2014*** on factors to be considered in awarding compensation.

On severance and leave pay, counsel for the applicant submitted that, there is no dispute that the same were paid on retrenchment. She argued that, at page 14 of the award, the arbitrator held that leave pay and severance pay were improperly computed without referring to any evidence to back up that finding. Counsel argued further that there was no evidence to show which amount was correct and which was incorrect. Counsel argued that arbitrator proceeded to make calculations

without showing the basis thereof. Counsel for the applicant added that, there was also no evidence to support 13 cheques that was awarded by the arbitrator. It was further argued by counsel for the applicant that respondents were already paid the 13 cheques as it was testified by DW1. Ms. Bachuba prayed that the application be allowed by quashing and setting aside the award.

In response, Mr. Jamal Ngowo, counsel for the respondents prayed to adopt the counter affidavit of Bruno Shaban to form part of their submissions. He submitted that Section 38 of Cap 366 R. E. 2019 (supra) guides what must be done if termination is based on operational requirements. He invited the court to the provisions of section 38(1)(c) and (d) of Cap 366 R. E. 2019 (supra). He submitted that for retrenchment to be fair, (i) notice must be issued, (ii) the employer must disclose all relevant information for purpose of consultation and (iii) consultation meeting prior to retrenchment must be held.

Mr. Joel submitted further that, in the application at hand, consultation was done by the applicant to the employees who were retrenched only and went on that consultation was supposed to be done to all employees. Counsel for the respondents submitted further that consultation was done while applicant has already decided as to who

should be retrenched. He cited the case of ***Tanzanite One Mining Ltd v. Maisala Said (2013) LCCD 199*** to bolster his submission that it was supposed to be prior making the decision. He further argued that DW1 and DW2 admitted in their testimony that consultation was done to employees who were retrenched. Counsel submitted that exhibits D2 and D3 shows that consultation was only done to those who were retrenched and not to all employees. Counsel went on that name of the persons to be retrenched were picked at random as testified by DW1 and PW2 hence there was no criterial for selection. He argued further that, respondents were given letters of consultation on the date of consultation meeting hence improper consultation. Counsel cited the case of ***Clare Haule v. Water Aid Tanzania Revision No.13 of 2019*** (unreported) wherein this court held that consultation must be made prior retrenchment as part of problem solving. He argued that what was done by applicant is not problem-solving exercise as she had decided prior consultation as it was held in the case *of* ***Bened Gindo & 27 others v. TOL gases Ltd (2013) LCCD 20***. Cousel for the respondent insisted that in retrenchment, real reasons and procedures must be complied with. He went on that the agreement reached between the applicant and the respondents cannot be regarded as fair if

the procedure were not complied with. He referred the case of ***IBM Tanzania Limited v. Albert M. Munju Revision No. 389 of 2018.***

Further to that, Mr. Joel distinguished ***Mainlines case*** (supra) as the facts are different with the one at hand, and the ***Tanzania Building's case*** (supra) is also distinguishable because in that case employees refused to accept notice and participation in the retrenchment process. He also distinguished the case of ***Pauline's case*** (supra) as it is irrelevant.

Counsel for the respondents argued that the notice of retrenchment (exhibit D2) was sent only to employees who were selected to be retrenched. Counsel argued that the award was fairly issued because the arbitrator gave reasons for compensation. Counsel for the respondents supported his argument by citing the case of ***Leopold Tours Ltd v. Rashid Juma and another (2014) LCCD 7*** where it was held that 12 months' salary compensation is the minimum and argued that respondents were awarded minimum amount provided for under the law.

On leave and severance pay, Mr. Joel submitted that, the same were poorly computed by the applicant during retrenchment. He cited section 42(1) of Cap. 366 R. E. 2019 (supra) and submitted that the it

provides how severance pay must be computed and argued that computation that was done by the applicant did not comply with that provision of the law.

On the relief of 13 cheques, Mr. Joel submitted that, DW1 testified that payment was done in accordance with terms of contract. He argued that at CMA, applicant did not tender documents to show what was paid to the respondents apart from empty words. He argued that the proof of payment was attached for the first time to the affidavit supporting this application. Counsel went on that the same was not tendered at CMA hence cannot be used in this court in this Revision. Counsel submitted that Rule 24(6) of the Labour Institutions (Mediation and Arbitrations Guidelines) Rules, GN. No. 67 of 2007 read together with Rule 28(1) of the Labour Court Rules, GN. No. 106 of 2007 requires the court to use CMA records and not otherwise. To bolster his argument, he cited the case of ***Tanzania Railways Ltd v. Mwinjuma Said (2015) LCCD 3***.

Furthermore, it was submitted for the respondents that, the affidavit in support of the application shows that respondents were paid half salary as 13 cheques while contract of employment requires full salary to be paid. Counsel for the respondents conceded that,

respondents entered into contract of employment with the applicant on different dates and different salary.

In rejoinder, Ms. Bachuba submitted that it is not the requirement of the law that, consultation should be done to all employees that is why, agreement must not be reached by all employees. counsel for the applicant distinguished the ***Tanzanite's case*** (supra) that it doesn't apply in the circumstances of this application. On random selection criteria, she submitted that DW1 did not state that selection was at random. Counsel argued further that allegation that respondents were given invitation letters at evening hours to attend the consultation meeting is not supported by evidence. She distinguished **Clare Haule case and Ngindo's case** (supra) that they are not applicable as consultation was conducted in the application at hand.

Ms. Bachuba added that, applicant had a fair reason for retrenchment and followed procedure for termination therefore ***IBM case*** (supra) cannot apply. Regarding 13 cheques, counsel submitted that DW1 testified that respondents were paid 6 months because they served the applicant for six months.

Having gone through rival submissions and evidence in CMA record and find that issues to be determined are: -

i. Whether termination of employment of the respondents was procedural fair,

ii. Whether the relief awarded by the arbitrator were legally justified.

To begin with the first issue, the procedure for retrenchment have been provided under Section 38 of the Employment and Labour Relations Act [Cap. 366 R. E. 2019]. This section requires among other things, a notice to be issued and consultation. Section 38(1)(d) provides:-

> *"38(1) In any termination for operational requirement (retrenchment), the employer shall comply with the following principles, that s to say, he shall-*
>
> *(d)* ***give notice,*** *make the disclosure and* ***consultant,*** *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 required by a recognized trade union;*
>
> *(iii)* ***any employee not represented by a represented by a recognized or registered trade union.***

As pointed herein above, the arbitrator held that consultation that was done was not thorough, adequate and meaningful. In the award,

the arbitrator found that the notice was issued at the evening hours after closure of business of the applicant. Counsel for the applicant criticized that finding and submitted that respondents were consulted hence the law was complied with and that even if it can be assumed that they were consulted at evening hours, there is no evidence to show that they were affected. On the other it was submitted on behalf of the respondents that consultation was done by the applicants to employees who were retrenched only and not to all employees.

I have given great consideration of the rival argument by the parties and considered evidence in the CMA record and find, as the arbitrator correctly did, that there was no proper consultation, though with a different reasoning based on the afore quoted provision. There is no evidence that was adduced by the applicant that disclosure was made to any trade union recognized in terms of section 67; any registered trade union with members in the workplace or that the respondents were not members of trade union for them to be consulted in absence of the said representatives.

It is a cardinal law that the purpose of consultation meeting is to enable both parties to reach agreement on certain terms as stipulated

under Rule 23(4) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 which provides as follows: -

> *"23 (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 on-*
>
> *(a) the reasons for the intended retrenchment (i.e the need to retrench);*
>
> *(b) any measures to avoid or minimize the intended retrenchment such as transfer to other jobs, early retirement, voluntary retrenchment packages, lay off etc;*
>
> *(c) criteria for selecting the employees for termination, such as last-in-first-out (LIFO), subject to the need to retain key jobs, experience or special skills, affirmative action and qualifications;*
>
> *(d) the timing of the retrenchment*
>
> *(e) severance pay and other conditions on which termination took place; and*
>
> *(f) steps to avoid the adverse effects of terminations such as time off to seek work."*

In the application at hand, it was submitted on behalf of the applicant that she complied with the procedure for retrenchment and tendered a notice for retrenchment (exhibit D2), invitation for

Retrenchment consultation meeting (exhibit D3), and the minutes for a consultation meeting (exhibit D4).

I have considered the two documents namely, exhibit D3 and D4 and noted that, the invitation for consultation meeting was addressed to the respondents by their names and not to all employees. Even the minutes of the consultation meeting which was also addressed to a particular employee (exhibit D4 collectively), there was no disclosure of the relevant information concerning the intended retrenchment especially the criteria used for selecting the employees to be retrenched. Reasons for their selection as reflected in the minutes shows that the respondents' positions were redundant. That was not a fair cause for the selection. This was also the position in the South African case of ***Justice Qalukwenza Sindane & Another vs. ABV Brands (PTY) Ltd, D1167/2017*** where it was held that: -

> *"The applicants are justified in complaining that there was no fair process and that they were* ***selected for retrenchment simply on the basis that the respondent decided that their positions were redundant*** *and that they have therefore been selected for retrenchment. In conclusion the respondent failed to justify its selection criterion as fair and objective. The respondent failed to meaningfully consult with the two applicants. The respondent failed to justify the dismissal of the two applicants as substantively and procedurally fair". (emphasis is mine)*

The purpose of consultation is to jointly solve the problem. This includes discussing criteria which will be used to select the employees to be retrenched. In the application at hand, made consultation while had already selected the employees to be retrenched and failed to disclose the way he selected them, and why them and not others. It is evident that applicant just summoned the respondents on the said consultation meeting just to show that she had complied with the requirement of the law. That was contrary to the requirement of the law.

I acknowledge the finding of my fellow judges in the cases of ***Resolution Insurance Limited's case*** and ***Mainline's* case** *(supra)* as cited by counsel for the applicant. But I am of the different view that, the one who is required to abide with the requirement of the law is the employer who in this case is the applicant. Despite of being aware of the procedures prescribed by the law, applicant decided to temper with them to meet her target.

Under the circumstances, I am in line with the arbitrator's finding that consultation was not properly conducted, hence termination was procedurally unfair.

Regarding the 2nd issue, Ms. Bachuba counsel for the applicant submitted that respondents were paid severance pay, leave pay and 13th months cheque. However, the arbitrator awarded them again without any proof as to what was miscomputed. Mr. Joel did not dispute the payment as he just said the same were wrongly computed.

I have examined the CMA record and find that it is undisputed that severance pay and leave pay were part of the retrenchment package. There is no doubt that, the same were paid to the respondents. There is no evidence in the CMA record showing that respondents dispute to have been paid. Dannyclaus Mushumbusi (PW1) in his testimony stated that computation of severance pay was done by dividing factor 30 instead of 26 but there is no proof on record to substantiate that claim. However, the arbitrator found that the same were improperly computed. I have keenly perused the records especially the CMA proceedings, I did not come across with the evidence showing how improperly the payment were done, and what was the difference claimed by the respondents. On such basis, I quash and set aside the arbitrator's order regarding severance pay and leave pay.

Regarding the 13th month cheque, the employment contract (exhibit D1) shows that respondents were entitled to the 13th Month salary in

November/December of each year. In his evidence, DW1 stated that respondents were paid six months because their termination was at the mid of the year. That evidence was not shaken. More so, respondents did not bring evidence at CMA disapproving what was stated by DW1. I therefore see no justification to disturb that solid evidence. With that uncontradicted evidence of DW1, the arbitrator erred to order respondents to be paid 13th cheque which they were already paid. I therefore, quash, and set aside the arbitrator's order of 13th month cheque.

Further to that, having found that the procedure for termination was not adhered, the arbitrator awarded respondents 12 months' salary as compensation. I find the same to be too excessive because termination was fair substantively. When termination is substantively fair but procedurally unfair, the remedy cannot be like the one provided under Section 40(1)(c) of Cap. 366 R. E. 2019 (supra). This was emphasized by the Court of Appeal in the case of ***Felician Rutwaza v. World Vision Tanzania, Civil Appeal No. 213 of 2019,*** CAT at Bukoba (unreported). Where it was held that; -

> *"...Under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she was right in exercising*

her discretion ordering lesser compensation than that awarded by the CMA..."

Since termination was substantively fair but procedurally unfair; and being guided by the above court of Appeal decision, I hereby quash and set aside the arbitrators order of 12 months' salary compensation. I further order that, respondents be paid three (3) months' salary as compensation for procedural unfairness.

On basis of the above finding, I find the application with merit. The CMA award is revised to the extent shown above. I therefore order that respondents will be paid as follows:-

1. Nguno Shaban whose salary was TZS 5,547,000/= per month will be paid 5,547,000 x 3= TZS 16,641,000/=.
2. Gloria E. Kaaya whose salary was TZS 2,344,000/= per month will be paid 2,344,000 x 3= TZS 7,032,000/=.
3. Mary Fortunatus Mwalabi whose salary was TZS 3,500,000/= per month will be paid 3,500,000 x 3= TZS 10,500,000/=.
4. Abdul Ramadhani Juma whose salary was TZS 2,344,000/= per month will be paid 2,344,000 x 3= TZS 7,032,000/=.

5. Joachim Ferdinand Monorua whose salary was TZS 2,979,000/= per month will be paid 2,979,000 x 3= TZS 8,937,000/=.

6. Yule Anna Masawe whose salary was TZS 2,344,000/= per month will be paid 2,344,000 x 3= TZS 7,032,000/=.

7. Marygloria Aksante whose salary was TZS 2,344,000/= per month will be paid 2,344,000 x 3= TZS 7,032,000/=.

8. Abdallah G. Mbwana whose salary was TZS 2,979,000/= per month will be paid 2,979,000 x 3= TZS 8,937,000/=.

9. Wilbert P. Manjonda whose salary was TZS 7,100,000/= per month will be paid 7,100,000 x 3= TZS 21,300,000/=.

10. Pauline Emil Kyendesya whose salary was TZS 2,344,000/= per month will be paid 2,344,000 x 3= TZS 7,032,000/=.

11. Owen Salewa whose salary was TZS 2,344,000/= per month will be paid 2,344,000 x 3= TZS 7,032,000/=.

12. Vicent Kibona whose salary was TZS 3,500,000/= per month will be paid 3,500,000 x 3= TZS 10,500,000/=.

13. Amos Mnanka whose salary was TZS 5,475,000/= per month will be paid 5,475,000 x 3= TZS 16,425,000/=.

14. Julius Mawinda whose salary was TZS 5,543,000/= per month will be paid 5,543, 000 x 3= TZS 16,629,000/=.

15. Samwel Edward Shayo whose salary was TZS 2,344,000/= per month will be paid 2,344,000 x 3= TZS 7,032,000/=.

16. Imelda Mziba whose salary was TZS 1,000,000/= per month will be paid 1,000,000 x 3= TZS 3,000,000/=.

17. Paschal Shehoza whose salary was TZS 1,000,000/= per month will be paid 1,000,000 x 3= TZS 3,000,000/=.

18. Erasto Kishinje Machubya whose salary was TZS 1,000,000/= per month will be paid 1,000,000 x 3= TZS 3,000,000/=.

19. Edwin Zabdiel Mrema whose salary was TZS 1,200,000/= per month will be paid 1,200,000 x 3= TZS 3,600,000/=.

20. Dannyclaus Mshumbushi whose salary was TZS 3,000,000/= per month will be paid 3,000,000 x 3= TZS 9,000,000/=.

21. Mariam Mgeni whose salary was TZS 8,247,224/= per month will be paid 8,247,224 x 3= TZS 24,741,672/=.

22. Jackon Mongi whose salary was TZS 1,675,000/= per month will be paid 1, 675,000 x 3= TZS 5,025,000/=.

23. Fredy Nicholaus whose salary was TZS 2,970,000/= per month will be paid 2,970,000 x 3= TZS 8,910,000/=.

24. Emmanuel Mwinyi whose salary was TZS 1,417,000/= per month will be paid 1,417,000 x 3= TZS 4,251,000/=.

25. Zawadi Mato Mkangara whose salary was TZS 1,650,000/= per month will be paid 1,650,000 x 3= TZS 4, 950,000/=.

In total applicant will pay TZS 228,570,672/= to all respondents.

Dated at Dar es Salaam this 31st March 2022.

B.E.K. Mganga
JUDGE