THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 516 OF 2020

BETWEEN

BIT TECH LIMITED.....APPLICANT

AND

FAHIMA HASSAN JUMA & 7 OTHERS ..... RESPONDENT

JUDGMENT

Date of last order: 23/03/2022
Date of judgment: 30/3/2022

B.E. K. Mganga, J.

Applicant is a legal person registered in the United Republic of Tanzania. The applicant deals with gaming and betting shops. Respondents were employees of the applicant. It was alleged by the applicant that in 2020, she was in financial constraint due to COVID -19 outbreak which impacted local and global and disrupted major sports which necessitated cancellation of all sports and closure of betting shops. On 25th March 2020, applicant retrenched the respondents allegedly, on operational grounds. Respondents were aggrieved by the said retrenchment as a result they filed labour dispute No. CMA/DSM/ILA/315/2020/217 complaining that there were no valid

reasons for termination of their employment and further that procedures were not followed. At CMA, respondents were claiming to be paid TZS 21,940,000/= being 12 months' salary compensation for unfair termination, one month salary in lieu of notice, severance and annual leave pay. On 20th November 2020, Hon. Mourice Egbert Sekabila, arbitrator, held that respondents were unfairly terminated and awarded the respondents to be paid TZS 29,051,665.8/=.

Applicant was aggrieved by the said award as a result, she filed this application seeking the court to revise the said award. In the affidavit of Chetan Chudasama, the director of the applicant, in support of the notice of application, the deponent stated that covid 19 disrupted all major sports hence cancellation of all sports and resulted into closure of betting shops and caused loss to the applicant. That, applicant applied for tax relief from both TRA and gaming Board as an attempt of reducing costs. Mr. Chudasama stated further that in reducing costs, applicant held consultation meeting and entered into retrenchment agreement with the respondents. In the said affidavit in support of the notice of application, the deponent raised four grounds namely :-

1. *That the arbitrator erred to hold that termination of the respondents was both substantively and procedural unfair due to absence of the financial statements hence no fair reason for the said retrenchment and failed to take into account exhibit P2 (minutes of the consultative meeting)*

between the applicant and the respondents while there was no evidence discrediting the same or claim of undue influence during execution of the same.

2. *Arbitrator erred in awarding 12 months' salary compensation while disregarding evidence of PW1 and PW2 tendered by the applicant.*
3. *That arbitrator erred in awarding respondent meal allowances and failed to note that the same was only meant to sustain respondents during working hours.*
4. *That arbitrator erred to hold that notice period was not adequate while all respondents adhered to and attended the meeting.*

Respondents filed a joint counter stating that in no time the applicant closed her shops because of Covid 19 or for any reason because customers were pouring in wearing masks and gloves and that respondents continued to collect cash on behalf of the applicant. They stated further that, there was neither consultation meeting nor agreement for retrenchment and further that their retrenchment was unfair.

When the matter was called for hearing, Mr. Hezron Jasson, learned counsel for the applicant appeared and argued the application for and on behalf of the applicant while the respondents appeared in person and chose Fahima Hassan Juma to argue the application on their behalf.

In arguing the application on behalf of the applicant, Mr. Jasson learned counsel put the afore grounds in three issues namely, (i)

whether there was valid reason for retrenchment, (ii) whether procedures were followed and (iii) what reliefs are the parties entitled to.

Submitting on whether there were valid reasons for retrenchment, counsel for the applicant faulted the arbitrator in holding that absence of financial statement to explain financial constraint of the applicant proved that there was no reason for retrenchment. Counsel for the applicant submitted that, evidence of Nickson Mtega (PW1) and Carlos Njako (PW2) proved that there were valid reasons for retrenchment as the applicant was facing financial constraint due to Covid 19 pandemic. Counsel went on that applicant prayed for economic relief from gaming Board and TRA as per Exhibit P4 that was disregarded by the arbitrator. Counsel for the applicant cited the case of ***Veneranda Maro and Another V. Arusha International Conference Centre, Civil Appeal No. 322 of 2020,*** CAT(unreported) wherein the Court of Appeal gave reasons and guidance for this Court to intervene the decision of the lower Court. He argued that the arbitrator disregarded the evidence on record and inquired more evidence hence a good ground for the court to intervene.

On the 2nd issue namely, whether procedure for retrenchment were followed, counsel submitted that the procedures were followed as

it was testified by PW1 and PW2. He argued that all respondents were notified before date of retrenchment and that there was consultation as evidenced by consultation minutes Exhibit P2. He submitted further that all respondents attended the said consultation meeting as per Exhibit P3 and that they were paid their terminal benefits as per Exhibit P5. Learned counsel for the applicant concluded that arbitrator erred in holding that Exhibit P2 did not conform to the conventional minutes because there is no law prescribing how the minute should look like and further that the arbitrator invited extraneous matters in disregarding the minutes for consultation meeting (Exhibit P2).

Counsel for the applicant submitted further that the arbitrator erred in holding that there was no adequate notice to the respondent. Counsel argued that section 38(1)(a) of the Employment and Labour Relations Act [Cap. 366 R. E 2019] does not provide time within which a notice should be issued. Counsel submitted further that the issue of notice cannot arise when all respondents had attended consultation meeting as shown in Exhibit P3. He submitted that in terms of Rule 23(7) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007, employer can shorten the notice period. He went on that, according to evidence of PW1 and PW2, applicant was in difficult economic situation unable to pay salary that is why, she issued

an immediate notice to respondents. Counsel for the applicant cited the case of ***Resolution Insurance Ltd V. Emmanuel Shio & Others, Labour Revision No. 642 of 2019*** (unreported) to support his argument that employer can shorten the period of the notice.

On the relief awarded to the respondent, counsel for the applicant submitted that arbitrator erred to award 12 months compensation because there were valid reasons for retrenchment. Counsel submitted further that the arbitrator erred to award meal allowance to the respondents because that allowance is for the employees to sustain their work. He submitted further that, respondents were paid severance because they were employed on unspecified.

Arguing the application on behalf of the respondents, Ms. Fahima Hassan Juma, submitted that respondents were employed at different dates but all on similar terms in their contracts of employment. She submitted that on 23rd March 2020 at night, respondents were notified over the phone to attend at applicant's Office situated at Upanga on 24th March 2020 but no reason was assigned. She went on that, normally when you go at Upanga Office, you must sign that you have entered the Office. That, on 24th March 2020 they were given papers showing consultation and agreement but there was no consultation or agreement. She went on that, applicant forced them to sign those

papers but she refused because there was no representative from Trade Union. She argued that, at CMA, applicant tendered attendance register instead of minutes for the alleged consultation meeting. She went on that applicant is dealing with betting and does not depend on football betting alone.

Ms. Juma submitted further that applicant is dealing with betting on Keno, dog racing, slots machines, visual games etc. and that it is not true that applicant was depending only on football that was suspended. She submitted further that, Carlos (PW1) testified that in December 2019 i.e. before Covid 19 pandemic, applicant's economic position became unstable while Mtega (PW2) testified that applicant economic position became unstable after Covid 19. She argued that there was contradiction in their evidence.

Ms. Juma submitted that, no notice of retrenchment was issued by the applicant and that respondents were not paid. She submitted that the argument that respondents received money thereafter filed the dispute at CMA is not true because there is no proof of payment that was tendered at CMA.

Ms. Juma submitted further that during Covid 19 pandemic, applicant did not suspend activities as there was no lockdown. She argued further that no respond from TRA or Game Board relating to

reduction of tax. She submitted that the said letter has nothing to do with retrenchment of the respondents.

On Meal allowance awarded, she submitted that the same was part of their salary that is why it was awarded. She went on that severance pay was not properly calculated because people with more experience but with same salary with the one who has served for a short period, was paid same severance pay amount.

Ms. Juma prayed that the application be dismissed for lack of merit. She argued further that, this application is blocking their Execution Application No. 586 of 2020. She submitted further that in the said execution application, applicant was ordered to deposit money in court but she has failed, as a result, applicant has filed another application i.e. Revision No. 456 of 2021. Ms. Juna submitted that applicant has not served the respondents with that application but they just learnt at the time they were in Court. She informed the court that Revision No. 456 of 2021 is scheduled for hearing on 24th March 2022 before Hon. Lwizile, J.

In rejoinder, Mr. Jasson, counsel for the applicant reiterated his submissions in chief and prayed that the application be allowed.

I have considered rival arguments between the parties in this application. The rival arguments and issues raised can best be disposed of by examining evidence adduced by the parties at CMA.

It was argued by counsel for the applicant that PW1 and Pw2 proved that there was valid reason for retrenchment based on covid 19 pandemic but Ms. Juma on behalf of fellow respondents arguing to the contrary. To resolve this rival argument, I have carefully examined evidence of the parties in the CMA record. In his evidence Carlos Njato (PW1), the senior operator manager of the applicant testified as follows:-

"Applicant has shops in the field and slot machines operated by cashiers. Reason for retrenchment was because of increase of operational costs i.e. ***costs for salaries, power, meal allowances, fuel for generators and receipts machines, waste products, computers, printers, and rent comparing to income.*** *The corona pandemic affected our business. We depended on gambling business on world football matches, the world closed football games. This led to closure of our business.* ***The effect were noted in December 2019"***

While under cross examination he testified as follows:-

"It is true that there were other games as keno and dog race, slot machines and SBG. There were about five gambling games. We intended to pay you terminal benefits, but you refused. Notice was issued on 23/03/2020, the consultation was 24 & 25 March 2020."

On his part, Nickson Gasper Mtenga (PW2) testifying on behalf of the applicant stated as follows:-

"***Applicants were issued with notice on 23/3/2020 over the phone call as it was urgent because the company was operating on loss for a long time.*** *To keep them working, the company could not be able to pay their salary...Company tried to introduce new games which did not depend on the league such as Kyron and visual game, and to access customers in small shops. However there was no success...* ***Criteria of retrenchment was last in first out (LIFO)and efficiency... Applicant attended meeting on 25/3/2020 with their trade union officials. only Shakira collected terminal benefits****".*

While under cross examination, PW2 stated as follows:-

*"**The company got loss in January 2020.** Corona contributed to retrenchment because most of our customers are on football. You refused termination.* ***You refused both agreement and termination letters. You refused to sign termination. We did not give you sufficient notice because it was urgent and we could not continue pay salaries."***

On the other hand, Fahima Hassan Juma (DW1) the only witness for the respondent, in her evidence she stated as follows:-

"*We were terminated unfairly. On 23/3/2020 at night we were told to report for the meeting on the next day to main offices at upanga. On 24/3/2020 in the morning we attended the meeting. However it was not a meeting. When we arrived we were given exh. P2.* ***We refused to sign as there was no any consultative meeting. We were not notified it was to be a retrenchment consultation.*** *We refused to sign. We were ordered to come back next day of 25/3/2020. On 25/3/2020 they* ***gave us exh p5***

collectively demanding us to sign. We still refused. *We left and on 31/3/2020 we served them demand notice... They did not follow the procedures and no reasons for retrenchment".*

When under cross examination she stated that Abdalla Hamis, Alhaji Maringo, Imma Emmanuel, Stella, Semen, signed the minutes and that all respondents attended the consultative meeting P3. But while under re-examination, she clarified that there was no consultative meeting and that there was no agreement reached.

It is my view that reasons for retrenchment according to PW1 and Pw2 seems to be the effect of Covid 19 though there is contradictions in their evidence as to when they felt that effect as correctly submitted by Ms. Juma on behalf of her fellow respondents.

On whether the procedure for termination was adhered, without hesitation, I hold that it was not. The evidence of PW2 and DW1 is clear that respondents were notified during night hours on 23rd March 2020 over the phone and were required to attend the alleged consultation meeting on 24th March 2020 in the morning. It was testified by PW2 that it was a matter of urgency. I reject that claim because according to the evidence of both PW1 and PW2 the alleged effect of Covid 19 was felt in December 2020 or January 2020. The alleged notice and consultation meeting was in March 2020. I therefore see no justification of urgency.

If at all it was urgent, applicant was supposed to issue the said notice and hold the consultation soon after she felt the alleged effect of Covid 19 and not otherwise.

It was submitted by counsel for the applicant that consultation meeting was held, and agreement reached. It was further submitted that; respondents were paid their terminal benefits and thereafter filed the dispute at CMA. This submission was countered by Ms. Juma on behalf of her fellow respondents that there is no proof of payment of terminal benefits and that there was no consultative meeting. With due respect to counsel for the applicant, there is no evidence to prove his submissions. I agree with Ms. Juma that there was no consultative meeting. Because there is no minutes of the said consultative meeting. The alleged minutes of the consultative meeting(exh.P2) does not qualify to be minutes of the meeting. The said exhibit P2 are letters addressed to each employee. I have taken an example the one relating to Fahima Juma It reads in part: -

"Bit/tech

Kwa: Fahima Hassan Juma 24/machi 2020

Yah: majadiliano ya kupunguza wafanyakazi

Huu ni muhtasari wa majadiliano yetu ambayo yalifanyika mnamo tarehe 24 Machi 2020 makao Makuu ya kampuni ya Bit Tech Limited...

Tafadhali nijulishe kama utakuwa na maswali..."

It was argued by counsel for the applicant that there is no law prescribing the format of the minutes of consultative meeting. I have no quarrel with that. But the said exhibit P2 does not qualify to be called as minutes because these are letters to individuals.

It was submitted that respondents attended the alleged consultative meeting and attendance (exh. P3) was tendered as proof. It is my considered view that the alleged proof of attendance of the consultative meeting (exh.p3) also does not prove that it relates to consultation. The said exhibit p 3 is titled **"mahudhurio ya kikao"** but does not say meeting of who and the purpose of the meeting. The said meeting does not necessarily relate to consultation with a view of retrenching some employees. The same shows that Carlos Njato (PW1) was the chairperson but in his evidence PW1 did not state that he was the chairperson. Even PW2 did not state as who was the chairperson of the meeting.

For the foregoing, I hold that the procedure for retrenchment was flawed hence respondents were unfairly terminated.

It was submitted by counsel for the applicant that the arbitrator erred to award respondents to be paid meal allowances. I have read evidence on the CMA record and find that there is no evidence to support payment of meal allowance. None of the witnesses testified that respondents were entitled for them to be awarded meal allowance. I therefore agree with counsel for the applicant that arbitrator erred to award the respondents to be paid meal allowance.

For the foregoing, the application partly succeeds. I therefore revise the CMA award and adjust it as hereunder:-

1. Fahima Hassan Juma will be paid TZS 37,692.31 as severance pay, TZS 140,000/= as notice, TZS 1,680,000/= as 12 months compensation, TZS 84,622.22 as leave allowance, TZS 51,851.85 as worked day in total she will be paid TZS 1,994,166.4.
2. Semeni D. Barua will be paid TZS 37,692.31 as severance pay, TZS 140,000/= as notice, TZS 1,680,000/= as 12 months compensation, TZS 115,681.48 as leave allowance, TZS 51,851.85 as worked day in total she will be paid TZS 2,025,225.64.
3. Alhaji Abdallah Maringo will be paid TZS 37,692.31 as severance pay, TZS 140,000/= as notice, TZS 1,680,000/= as

12 months compensation, TZS 212,592.26 as leave allowance, TZS 51,851.85 as worked day in total he will be paid TZS 2,122,136.31.

4. Abdallah Omary Khamis will be paid TZS 113,076.93 as severance pay, TZS 140,000/= as notice, TZS 1,680,000/= as 12 months compensation, TZS 119,259.26 as leave allowance, TZS 51,851.85 as worked day in total he will be paid TZS 2,104,188.04.
5. Ester Athumani Makunza will be paid TZS 37,692.31 as severance pay, TZS 140,000/= as notice, TZS 1,680,000/= as 12 months compensation, TZS 157,266.67 as leave allowance, TZS 51,851.85 as worked day in total she will be paid TZS 2,066,810.83.
6. Stella Sylvanus Kapiga will be paid TZS 37,692.31 as severance pay, TZS 140,000/= as notice, TZS 1,680,000/= as 12 months compensation, TZS 96,705.56 as leave allowance, TZS 51,851.85 as worked day in total she will be paid TZS 2,006,249.72.
7. Wema Masson Mshana will be paid TZS 37,692.31 as severance pay, TZS 140,000/= as notice, TZS 1,680,000/= as 12 months compensation, TZS 172,822.22 as leave allowance, TZS

51,851.85 as worked day in total she will be paid TZS 2,082,366.04.

8. Imani Emmanuel Mwasangeele will be paid TZS 37,692.31 as severance pay, TZS 140,000/= as notice, TZS 1,680,000/= as 12 months compensation, TZS 193,562.96 as leave allowance, TZS 51,851.85 as worked day in total she will be paid TZS 2,103,107.12.

The applicant will therefore pay a total of TZS 16,504, 250.1 to respondents instead of TZS 29,051,665.8 that was awarded by CMA.

Dated at Dar es Salaam this 30th March 2022.

B.E.K. Mganga
JUDGE