IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 303 OF 2021

BETWEEN

GODFREY SHUMA ..... APPLICANT

VERSUS

AI OUTDOOR (T) LIMITED ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J

The parties herein entered into employment contract whereby the applicant was employed by the respondent as a Finance Manager in a fixed term contract of three years, commencing on 10th February, 2019 to the 09th February, 2022 (exhibit **P1**). On 31st May, 2020 the applicant was terminated from employment on what the respondent termed as operational requirement, a restructuring of the company in order to reduce some positions caused by financial constraints (retrenchment). Aggrieved by the termination, the applicant referred the matter to the Commission for Mediation and Arbitration for Ilala ("CMA"). In his CMA Form No. 1, the applicant sought for a compensation totalling to an amount Tshs. 146,369,231/- which included leave balance, remuneration for word done before breach of contract and

compensation for the salaries of the remaining period of the contract. The CMA was not convinced by the applicant's claim and partly allowed the dispute by awarding the applicant a total of Tshs. 5,669,230.8 as leave allowance, dismissing the remaining part of the claims. Aggrieved by the CMA's award, the applicant filed the present application under the provisions of Section 91 (1) (a) and (b), Section 91(2) (a) and (b), Section 91(4) (a) and (b), Section 94(1)(b)(i) of the Employment and Labour Relation Act No. 6 of 2004 as amended time after time, Rule 24(1), 24(2) (a), (b),(c),(d),(e), and (f) and Rule 24(3)(a),(b),(c) and (d) and Rule 28 (1) (c), (d) and (e) of the Labour Court Rules of 2007, GN No. 106/2007) He is seeking for the following orders:

1. That this Honorable court be pleased to call for the records of the proceedings and an Award of the Commission for Mediation and Arbitration of Dar es Salaam in Labour Dispute No. CMA/DSM/ILA/518/2020/203 and set aside the part of Award of the Commission for Mediation and Arbitration delivered by Hon. William, R. (Arbitrator) on 25th June 2021.

2. That after revise and set aside that part of an Award this Honourable Court to order Respondent to pay the Applicant the compensation of remaining period of the contract 20 months from

June, 2020 to February, 2022 equal to TZS 134,000,000.00 (Tanzania Shillings One hundred thirty four Million only).

3. That this Honourable Court be pleased to determine the matter in the manner it considers appropriate and give any other relief deem fit just to grant.

On the other hand, the respondent strongly opposed the application by filing counter affidavit, notice of opposition and a preliminary objection that the application is overtaken by events.

On the 15th day of September, 2021, when the parties appeared before me, I made an observation that from the way the P.O was crafted, I found it just that the objection raised be adopted as one of the legal issues for determination during hearing of the main revision application. The hearing proceeded by way of written submissions by cross submissions hence when the applicant was making submissions on the substance of the ground of revision, the respondent made submissions in chief on the issue of raised as a preliminary objection. This was followed by a cross reply and a cross rejoinder. Mr. Thomas Daudi Sabai, personal representative appeared for the applicant whereas Ms. Maria Juma Kimwaga, Learned Counsel was for the respondent.

Going through the submissions for and against the application as well as the records of this court, I find that the applicant raised an issue which needs to be addressed by the court before going to the merits of the application. The applicant brought to the attention of this court that the respondent filed the counter affidavit and the notice of opposition out of time granted by the court. In his submissions, Mr. Sabai submitted that the respondent was granted 15 days from the date of service to file counter affidavit. That the respondent was served on 17th August, 2021 and filed the counter affidavit and notice of opposition on 06th September, 2021 which is beyond the 15 days prescribed.

Responding to the issue raised, Ms. Kimwaga submitted that the relevant objection is raised late to deprive the respondent the right to be heard. To support her submission, the counsel cited the case of **M/S Darsh Industries Limited v. M/S Mount Meru Millers Limited** (Civil Appeal No. 144 of 2015). She also argued that the counter affidavit and notice of opposition being filed out of time does not hinder or prejudice the applicant in any way. She therefore, urged the court to adopt the counter affidavit and notice of opposition and dismiss the objection raised by the applicant.

I have considered the parties argument on the relevant objection, I find the respondent allegation that the objection is raised late to deprive him the right to be heard to be without merit. The opportunity to be heard is a factor of time, that the other party is afforded time to respond to the allegations that are advanced against her. Therefore if the respondent had more than three weeks to respond to those allegations, that means she has been afforded sufficient time to make a reply to those allegations, the issue of opportunity to be heard cannot, under the circumstance, be said to have been denied. Therefore Ms. Kiwanga was bound to make reply accordingly and not to escape her obligation under the umbrella of right to be heard. Under such circumstance infringement of the right to be heard cannot stand and the cited case thereto is irrelevant.

Going back to the records of this court, as per the court order dated 10th August, 2021; Hon. Ngh'umbu, the Deputy Registrar, ordered the respondent to file the counter affidavit 15 days from the date of service. The respondent does not dispute the fact that he was served on 17th August, 2021. The record shows that the counter affidavit was filed in court on 05th September, 2021, almost 20 days from the date of service. The respondent did not even bother to seek leave of the court

to file the relevant documents out of time. The obligation to obey court orders was emphasised in the case of **Olam Tanzania Limited v. Halawa Kwilabya, DC Civil Appeal No. 1 7 of 1999**, cited in the case of **Famari Investment T. Ltd vs. Abdallah Selemani Komba, (Misc. Civil Application 41 of 2018) [2020] TZHC 386 (11 March 2020)** in which it was held that:-

> *"Now what is the effect of a court order that carrier instructions which are to be carried out within a predetermined period? Obviously such an order is binding. Court orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored, the system of justice will grind to a halt or if will be so chaotic that everyone will decide to do only that which is conversant to them. In addition, an order for filing submission is part of hearing. So if a party fails to act within prescribed time he will be guilty of in-diligence in like measure as if he defaulted to appear...This should not be allowed to occur. Courts of law should always control proceedings, to allow such an act is to create a bad precedent and in turn invite chaos."*

From the cited authority, it is conclusive that when a document is filed in court out of the prescribed time without leave of the court, it is as good as failure to lodge the required document at all. The counter affidavit and notice of opposition in this case was filed out of time without leave of the court, thus the contested documents are hereby expunged from the court records. The effect of failure to file counter affidavit has been stated in numerous decisions including the decision of the Court of Appeal in the case of **Finn Von Wurden Petersen and another Vs. Arusha District Council, (Civil Application No. 562 of 2017) [2020] TZCA 167 (02 April 2020)** where it was held that:-

> *"...the respondent who appears at the hearing without having lodged an affidavit in reply is precluded from challenging matters of fact, but he can challenge the application on matters of law."*

Being bound by the decision of the Court of Appeal above, the respondent is precluded to challenge matters of fact he is limited to matters of law. It is however pertinent to note that since this is a Revision application whereby the applicant is moving the court to call for the records, set aside the award and determine the dispute in a manner

I deem appropriate, the evidence adduced by the respondent during arbitration shall be fully regarded.

Coming to the objection raised by the respondent, that the application is overtaken by events. Ms. Kimwaga submitted that since the CMA's award has already been executed, the present application is overtaken by event. Responding to the preliminary objection, Mr. Sabai conceded to the fact that the respondent has paid the applicant the leave allowances that was awarded by the Arbitrator. However, Mr. Sabai argued that the present revision application is centred on the substance of the award by not awarding the remedies for breach of contract which as prayed by the applicant in the CMA Form No. 1.

Having considered the parties arguments, the objection need not detain me much, I am in agreement with Mr. Sabaya that the applicant is only contesting part of the award which dismissed the other claims of the applicant as per the CMA Form No.1, compensations which were not awarded by the Arbitrator. As clearly indicated in the affidavit in support the applicant is challenging the award for the arbitrator's failure to make a finding that the applicant was unfairly terminated. The prayer therein is to that the award is partly quashed and not setting aside the whole of the award. Therefore the applicant having received the amount awarded

as per some of his prayers in CMA Form No.1 does not preclude him from challenging the remaining substantive part of the award because his initial claim was that he was unfairly terminated, something which the arbitrator did not agree with hence this revision. Thus, the objection raised by the respondent has no merit and is it is hereby dismissed. I will proceed to determine the substantive part of this application whereby the applicant is challenging the fairness of his termination.

In his submission in support of the application, Mr. Sabai started by a prayer that the applicant's affidavit be adopted to form part of his submission. He then urged the court to consider damages for breach of contract because the retrenchment procedures were not followed in this case. He submitted that the Arbitrator erred in not finding that the applicant was not consulted as shown in exhibit P4. That there was no retrenchment agreement between the parties because the so called agreement available in records lacks signature of the Executive Chairman.

Mr. Sabai continued to submit that exhibit P4 is a mere draft and it does form part of the correspondence between the applicant and the respondent. Further that the respondent failed to convene the second consultation meeting as indicated in exhibit P4 thus the applicant did not

consent on the retrenchment. He concluded that there was no retrenchment agreement in this case.

Mr. Sabai submitted further that as per section 38 of the ELRA, one of the criteria for retrenchment is consultation, something which was not done in this case. To support his submission, he cited the case of **Tanzania Building Works v. Ally Mgomba & 4 others, [2011-2012] LCCD 1**. He then argued that the respondent failed to prove the alleged retrenchment as there must be valid reason of retrenchment coupled with the stipulated procedures as per section 38 of ELRA.

Mr. Sabai further submitted that the respondent did not discharge his duty to prove the termination on balance of probabilities as per Rule 9 (1) (3) of GN 42/2007. He therefore urged the court to allow the application and award the remedies for breach of contract.

Since most of the respondent's submissions were on the factual issues, they will be disregarded as the counter affidavit has been expunged from the records. However, in ground (d) of the revision in the applicant's affidavit, the applicant has raised an issue of law. The issue is that the arbitrator's award does not conform to the legal requirements of the award as it fails short of the reason of which the

arbitrators had reached her findings and fails to analyse the evidence given to support the validity of reasons for retrenchment given.

Mr. Sabai then submitted that the impugned award is not in conformity with the legal requirements because the Arbitrator did not state reasons for his decision.

In reply, Ms. Kiwanga submitted that the arbitrator observed the requirement of the law stipulated under Rule 23(1) (2)(a)-(c) of the Employment and Labor Relations (Code of Good Practice) Rules, G.N No. 42/2007 ("the Code") which provides that that retrenchment shall be based on three issues, that economic needs, technological needs or structural needs. She argued that in the impugned award, it is stated at page 14 that the respondent clearly explained to the applicant the reasons for the retrenchment being due to structural needs.

After considering the applicant's submission in support of the factual part of the application and the parties submissions on the point of law on whether the impugned award was in conformity with the law, I find that the court is called upon to determine the following issues; whether there was retrenchment agreement between the parties, whether the respondent had valid reason to retrench the applicant and whether the respondent followed procedures in terminating the

applicant. However, since the applicant is challenging the validity of the award for lack of reasons for the decision, I will start to determine that point.

Mr. Sabai's argument is that the award is not in conformity with the legal requirements because the Arbitrator did not state reasons for his decision. Ms. Kiwanga counter argued that the reasons for the decision are stated on page 14 of the award. On this point, I am in agreement with Ms. Kiwanga that the reasons for the decision were clearly stated by the arbitrator from page 12 of the impugned award. The arbitrator referred to EXP4 and EXP2 and concluded that the two parties herein sat and agreed on the issue of retrenchment and that the applicant testified that the respondent was not going into financial difficulties and continued to hire beyond his termination. Referring to Rule 9(4) of the Code, the arbitrator concluded that the procedure for retrenchment was followed. On that note, the fourth ground is without merits because the arbitrator gave reasons for his decision.

Having so found, I will determine the remaining issues together by analysing whether the procedures for retrenchment was followed and whether there was a valid reason for retrenching the applicant. As per the records, the applicant was terminated from employment on the

ground of retrenchment as it is reflected in the termination letter (exhibit P3). The CMA found that the parties herein agreed on the retrenchment.

Retrenchment is defined under Rule 23(2) the Code which provides as follows:

> *"Rule 23 (1) A termination for operational requirements (commonly known as retrenchment)* ***means a termination of employment arising from the operational requirements of the business.*** *An operational requirement is defined in the Act as a requirement based on the economic, technological, structural or similar needs of the employer.*
>
> *(2) As a general rule the circumstances that might legitimately form the basis of a termination are:-*
>
> *a)* ***economic needs*** *that relate to the financial management of the enterprise;*
>
> *b)* ***technological needs*** *that refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees*

to adapt to the new technology or a consequential restructuring of the workplace;

c) ***structural needs*** *that arise from restructuring of the business as a result of a number of business related causes such as the merger of businesses, a change in the nature of the business, more effective ways of working, a transfer of the business or part of the business.*

[Emphasis is mine]

Under Section 39 of the ELRA, in proceedings concerning unfair termination of employment, it is the employer who is obliged to prove that the termination is fair. In this case, the termination was allegedly based on the first and third reason of the circumstances for retrenchment quoted above. It is now to see whether at the CMA, the respondent proved the operational requirements. DW1 testified for the respondent, his testimony was that after going through financial difficulties the respondent decided to restructure some of the positions in the office where the applicant's position became redundant. DW1 testified further that they informed the applicant that his position was scraped and that the applicant was notified and consulted on the retrenchment hence, he agrees to the alleged retrenchment as

evidenced by the email conversation (exhibit D1). On his part the applicant is strongly alleging that the alleged retrenchment agreement never existed between the parties.

A close at the emails EXP2 and EXD1, there is no place where the respondent explains how there is a financial crisis in the company to have justified the retrenchment. They were just emails to inform the applicant that his position has been scrapped off the company structure following financial difficulties. It is pertinent to note that being a finance Manager, the applicant would have been in a better position to know of those difficulties hence there should at least be some tangible discussions with the person responsible with finances on how the company was going through the difficulties.

Further to the above, I have noted that during arbitration proceedings, the applicant testified before the respondent hence the respondent had better opportunities to prove the difficulties, something which she failed to do. That being the case, what would have saved the respondent is to show that the procedures for termination on operational requirements as stipulated under Section 38(1) of the ELRA were followed. This takes me to the second issue, whether the procedures for termination on operational requirements were followed.

The procedures for a valid retrenchment is explained under Section 38(1) of the ELRA. For the purpose of determination of this matter, I will reproduce the provisions of the Section 38(1) hereunder:

(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 question is whether the procedures under Section 38(1) were followed. I had a glance on the alleged retrenchment agreement and other evidences tendered in support of this case. As rightly contested by the applicant, there is no one legal document to be termed as a retrenchment agreement entered between the parties herein. Ms. Kiwanga wishes for the court to believe that the conduct and email conversation of the parties indicates that the alleged agreement existed. Looking at the email conversations (Exhibit P2 collectively), they show that the applicant was summoned to a consultation meeting with the group Chairman at his residence at Laibon Street in Oysterbay. Furthermore, the relevant exhibit summarized the discussion the parties had at Laibon where it was also agreed to schedule the second consultation meeting to discuss about retrenchment packages. My first concern would be why would the group Chairperson call the applicant at his residence to discuss about official issues? Why didn't this discussion

follow a proper procedure by taking place at workplace with the trade union representatives involved? How would one expect the employee to have a free and fair mind to reason with his Chairperson who called him at his residence? Why at his house anyway? At this point there are too many questions which are without answers.

I have noted that in one of the emails, the respondent informed the applicant that there will be a second round of discussions and terminal benefits, there is no any other email to prove that the parties had the second round of discussion the retrenchment terminal benefits as per (exhibit D2). In the EXP2, they are just emails to inform the applicant of the meeting at Laibon Street but there is no minutes of that meeting to prove what transpired therein. In the relevant exhibit D2, the arties agreed to schedule a second meeting and there is no further proof that the said meeting was held.

I have further taken a thorough look at the email correspondences, but there is no place in those emails which show that the applicant ever respondent to any of them in agreement of what was allegedly agreed by the parties. They are direction, from the respondent to the applicant. As to the second issue of whether the respondent had valid reason to retrench the applicant, the reason for retrenchment must

be based on the reasons cited above. In the matter at hand the respondent only alleges that he terminated the applicant due to financial constraints. Looking at the record there is no evidence to prove the alleged financial constraints. The respondent also alleged that he restructures the positions in the office but there is no prove of the same. Therefore, it is crystal clear that the respondent failed to prove the reason for termination on the ground of retrenchment as it is required under section 39 of ELRA.

On the last issue as to procedures for retrenchment the same are provided under section 38 of ELRA reads together with Rule 23, 24 and 25 of GN 42/2007. In the matter at hand the respondent failed to comply with the stipulated procedures in the relevant provisions. As stated above there is no proof of proper consultation to the applicant. The respondent did not disclose sufficient evidence to prove the necessity of the alleged retrenchment. Similarly, the criteria for selection of the retrenched employees are not clear. The record indicates that the applicant was the only targeted employee to be retrenchment without justifiable reason to do so. On that basis I have no hesitation to say that the respondent did not follow the stipulated procedures in terminating the applicant.

In the result as it is found that the respondent had no valid reason and did not follow the required procedures to retrench the applicant, I find the applicant is entitled to the remedies for breach of contract as claimed. The CMA's award is hereby revised and set aside. As stated above the employment contract of the applicant commenced on 10th February, 2019 and agreed to end on 09th February, 2022. The applicant was terminated from employment on 31st May, 2020 therefore the remaining period of his contract is twenty (20) months and nine (9) days. It is undisputed that the applicant's salary was Tshs. 6,700,000/= thus, the respondent is ordered to pay him a total of **Tshs. 136,319,230.77** as the remaining period of the contract.

Dated at Dar es Salaam this 25th day of March, 2022.

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S.M. MAGHIMBI
JUDGE