IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATE REVISION NO. 60 OF 2021 & 79 OF 2021

BETWEEN

SHOOTERS RESTAURANTS LIMITED..... APPLICANT

VERSUS

GODWIN GEORGE SIMBA.....RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Kinondoni)

(Faraja : Arbitrator)

dated 18th day of January 2021

in

Labour Dispute No. CMA/DSM/KIN/320/2020/195

JUDGEMENT

31st January & 18th February, 2022

Rwizile J,

This application is from the decision of the Commission for Mediation and Arbitration. This court has been asked to call for records, revise and set aside the award of the CMA. In brief, it can be stated that the respondent was employed by the applicant on a contract for unspecified period since 2013. He was paid, the salary of TZS. 3,000,000/=. Due to the outbreak of COVID – 19 pandemic, the Regional Commissioner of Dar es Salaam directed all restaurant businesses in Dar es Salaam to operate in as a take away. This, had a negative impact on the applicant's business. The

applicant, in response to the obtaining circumstances therefore met with all staff. She had three options to offer to them which included taking leave without pay for certain period of time, have salaries reduced and/or retrenchment. The respondent is alleged to have opted for salary reduced. However, this offer was rejected, but instead opted for termination upon payment of terminal benefits. Terminal benefits offered were rejected for being unfair. This paved the way to filing a dispute with the CMA, claiming for unfair termination on the reason that the procedure for termination was not followed. The CMA, upon hearing, ruled in favour of the respondent and ordered re-engagement of the respondent.

The applicant was not satisfied with the decision and so filed Revision No. 60 of 2021 asking this court to have it set aside. On party of the respondent, re-engagement was not a better part of the ruling, therefore Revision No. 79 of 2021 was preferred to have the same decision set aside. The two applications were consolidated by this court on 19th April 2021.

At the hearing, two grounds for determination were agreed as follows;

i. Whether Shooters Restaurant Limited terminated the respondent
ii. Whether re-engagement was a proper remedy for the respondent

Mr. Avitus Rugakingira, advocate for the applicant argued the application. On the first issue, he submitted that following the outbreak of Covid – 19, the Government in DSM ordered all restaurants in Dar es Salaam to conduct their business by takeaway. He said, this way of doing business reduced applicant's business earnings.

The Advocate for the applicant continued to submit that, the applicant met with all employees. It was submitted that a proposal was made in three things which were to have unpaid leave, reduce their salaries or retrenchment. He said, it was the respondent who opted for reduction of the salary but did not agree with the amount offered, hence opted for the retrenchment.

It was further argued that when the applicant was effecting the agreed terms, the respondent went to the CMA to file a dispute for unfair termination. The applicant, went on submitting that, she did not terminate the respondent since the respondent opted to be terminated as exhibit D1 shows. He argued that, even during cross- examination the respondent admitted not to have been terminated. He said, the same did not agree on salary deduction.

Dealing with the second issue, it was submitted that the applicant has no good relationship with the respondent. It was so, because upon not being satisfied with the given terminal benefits, he uttered abusive words against Dana Law. He added, exhibit D5 shows so. It was further, under section 40(1) of the Employment and Labour Relations Act [CAP. 366 R.E. 2019], re-engagement as ordered by the arbitrator only happens if there is a finding that the employer unfairly terminated the employee.

He argued, in this case, the respondent was not terminated by the applicant. The Advocate also submitted; the applicant made efforts when discussing terminal benefits with the respondent but he did not agree as exhibits D6 shows.

To oppose this application, on the first issue, the respondent submitted that he was unfairly terminated. He argued following the stated announcement, a staff meeting was convened by the applicant. He said, further that, all workers were given options of either taking unpaid leave, have a reduced salary or go for retrenchment. It was his argument that, he opted for his salary reduction. To his dismay, it was noted later that his salary was reduced to TZS 300,000, instead of TZS 500,000, contrary to their agreement. He therefore did not agree and opted for the retrenchment as exhibits D1, D2 and D3 show. The respondent also

submitted further that the options given to the staff was not party of the procedures for termination. In his view, this was unfair termination.

The respondent further submitted that, the applicant did not follow procedures for retrenchment as provided for under section 38 of ELRA and Rule 23 of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007. The respondent held the view that, by not following the procedures provided under the relevant law, it renders the whole retrenchment exercise unfair and so his termination, as provided for under S. 37 (1) and (2) of the ELRA.

Called upon to argue the second ground, the respondent said; exhibit D5 shows that parties have no good working relationship. Based on that reason, an order for re-engagement was not proper. He therefore asked this court to set aside the award.

By way of rejoinder Mr. Avitus for the applicant submitted that the applicant was in the retrenchment process, when the respondent filed a dispute with the CMA. The learned advocate argued further that there was no termination done to the respondent. He therefore asked this court to quash and set aside the award.

This court in determining the issues raised went through the CMA proceedings and exhibits tendered. It is in record that Dw1 told the CMA that because of COVID – 19 outbreak and following the government announcement on the take away issue, the applicant called the staff meeting as per exhibit D2. They were given three options, which as said, were to have them accept a leave without pay, salary reduction or retrenchment. It is on record, that the respondent opted for salary reduction. He later changed his mind and did not accept such reduction because it was too little. It is clear therefore that the respondent during cross-examination admitted to have opted for the termination. This was following failure of the applicant to pay a reasonable salary; it can therefore be taken so. Exhibit D1 witnessed the conversation between applicant and respondent which stated;

"Hello Dana.

Sorry!

I can neither accept unpaid leave,

No deduction of 300,000 out of 3mil.

YOU CAN TERMINATE ME.

thanks"

It is from this point of view that this court believes and so holds that this text message was given later after the meeting. This is therefore clear

that there no agreement reached in the consultation meeting on the amount of salary to be paid in reduction.

It should be noted that based on the obtaining situation, the applicant was experiencing economic hardships which merited retrenchment. This court has held so in several cases including the case of **Bernard Gindo & 27 others V. TOL Gases LTD,** Revision No. 18 of 2012. In this case, the respondent experienced economic constrains necessitating retrenchment. Parties had a number of consultative meetings on the retrenchment issue over a number of months. However, they disagreed on the issue of payment upon retrenched. It was stipulated under the existing voluntary agreement. After the stalemate the employer implemented the retrenchment exercise. The employees filed a dispute with the CMA for unfair termination. The CMA held that the termination was procedurally fair as there was adequate consultation. The decision was confirmed by this Court.

Basing on the facts of this case, I am bound to hold that retrenchment procedure stated under section 38(1) of the ELRA as submitted, and the terms of rule 23 and 24 of the Code of Good Practice, GN No. 42 of 2007 were not complied with. I am saying so because, exhibit D2 shows the list of the employees who attended the general meeting on 20th April

2020. Exhibit D3 shows those who accepted unpaid leave and the respondent is among those who opted for retrenchment. There is no record showing what was agreed as payment known as retrenchment package. For the consultation meeting held on 20th April 2020, to be meaningful, parties had to come to conclusion on what should be their package. It seems, this was not discussed and the applicant only imposed the terms she had, based on the situation she was facing. This can be reflected in exhibit D5, which is a statement, where it was explained that the respondent accepted retrenchment and when he went to correct his dues, he said the same was not enough. This shows, there was no agreement prior that day. This was on 21st April 2020. To fortify this, there is also exhibit D4. This is a termed as last payment.

According to Dw1, when the respondent requested for termination, she said in her evidence that she prepared terminal benefits. So, it is clear to me that there was no adequate consultation. Consultation as stated under section 38 of the ELRA, is an essential tool, permitting the parties to come to a joint problem-solving exercise. This, in turn, leads to arriving at an agreement on the reasons for such retrenchment. In this case, there were three options to take and there was no any amount of discussion. This is against the Code of Good Practice. The reason for adequate consultation is clear and should not be overemphasised. Retrenchment in

itself is in essence a no-fault termination. It has adverse effect on the employees. That is perhaps why, the Code of Good Practice, GN No. 42 of 2007, requires courts to scrutinize the process to ensure rules of fairness are strictly complied with. This is as per rule 23(3) of the Code.

Retrenchment may be done for reason of operational requirements. However, the term refers according to section 4 of the ELRA and rules 23(1) of the Code of Good Practice, to be based on, economic, structural, technological or similar needs of the employer. But for retrenchment to hold, three principles as per section 38(1) must be met namely, **one,** give notice of intention to retrench. The notice, it has also been stated should be **sufficient** and be supplied to the workers. **Two**, disclose all relevant information for the intended retrenchment. This stage is important because it lays a good ground for the **third** step which is consultation. Consultation stated here should not only be done to the intended employees but also to the trade union registered at the work place if it exists. Then an agreement must be reached, if not other steps have to follow. In all, it is the duty of the employer, therefore to prove that the procedure stated were whole complied with.

Having said what, I have said, I hold that as under rule 23(2) of the Code, substantive fairness was met. But to the contrary, it was not procedurally

fair as under section 38 of the Act. In my considered view, the applicant indeed terminated the respondent unfairly. The first issues raised is answered in the affirmative.

On the second issue, the arbitrator ordered re-engagement after a finding that the termination was unfair as provided under section 40(1)(b) of ELRA, which states that; where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer, to re-engage the employee on any terms that the arbitrator or Court may decide.

This court basing on the evidence on record holds a different view. Re-engagement was not proper based on bad blood between the two parties as stated in exhibit D5. It is apparent that the parties have no good relationship and for that matter, they cannot work together at peace.

I therefore agree with the respondent that the order for re-engagement cannot stand the test provided by the law. I therefore answer the second in the negative.

To what reliefs are the parties entitled to. This is based on section 40(1) (c) (2) of the ELRA. Therefore, the respondent, GODWIN GEORGE SIMBA should be paid on top of TZS 4,100,716.00, catering for a notice of one

month, leave, and severance pay as stated in exhibit D4, the remuneration at the salary of 3,000,000/= equal to 6 months.

A. K. Rwizile

JUDGE

18.02.2022