IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 115 OF 2021

BETWEEN

SULTAN KITAMBULIO AND 165 OTHERS..............................APPLICANTS

VERSUS

DAR ES SALAAM WATER AND SEWERAGE CORPORATION (DAWASCO) under a succession of DAWASA................1ST RESPONDENT

DAR ES SALAAM WATER & SANITATION AUTHORITY (DAWASA)........................2ND RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Ilala)
(Urasa: Arbitrator) dated 15th day of November 2016 in
Labour Dispute No. CMA/DSM/ILA/R.372/2013

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JUDGEMENT

07th June 2022 & 15th June 2022

K. T. R. MTEULE, J.

This Revision application arises from the award of the Commission for Mediation and Arbitration in **Labour Dispute No. CMA/DSM/ILA/R. 372/2013** at Dar es Salaam Ilala. This court has been asked to call for the CMA record, revise it and set aside the award therefrom. **SULTAN KITAMBULIO AND 165 OTHERS,** the Applicants herein are praying for the orders of the Court in the following terms:-

1. This Honourable Court be pleased to call for records of the

Labour Disputes No. CMA/DSM/ILA/R.372/13 delivered by Hon. Urasa, Arbitrator on 15th November 2016, inspects, examine such records therein and its proceedings to satisfy as to correctness, rationality, propriety and legality of the award.

2. That the Honourable Court be pleased to revise and set aside the whole of the proceedings and subsequent Award of the Dispute No. CMA/DSM/ILA/R.372/13, by Hon. Urasa, Arbitrator on 15th November 2016 on the ground that the decision is illegal and factually wrong.
3. Any other order of relief as the Honorable Court may deem fit and just to grant.

At this point I find it appropriate, to offer a brief sequence of facts leading to this application as extracted from CMA record, the affidavit and the counter affidavit. The Applicants were employed by the respondents in different date and capacities. They switched their roles between the 1st respondent and the 2nd Respondent in different times.

On 18th January 2007 the Applicants were retrenched for the reason of structural needs in business operations. Being dissatisfied with the employer's decision, 431 employees opted to refer the matter to the

Commission for Mediation and Arbitration (CMA). At CMA they were awarded 12 months compensation. The applicants were aggrieved with the compensation of 12 months hence this application for revision.

Across with the Chamber summons, supporting the application the Applicants filed an affidavit, in which after elucidating the chronological events leading to this application, alleged to been terminated unlawfully in the retrenchment exercise. They claimed that they were entitled to be reinstated and not to be compensated by 12 months salaries.

In their affidavit, the Applicants advanced three legal issues of revision as stated at paragraph 4 of the affidavit as paraphrased as follows:-

i) Whether it was justified by the trial Commissioner to award 12 months salaries compensations disregarding the applicants' prayer for the reinstatement as their best option without giving reason.

ii) Whether the arbitrator was right in not considering Applicant's payment of other entitlements agreed with parties based on "Mkataba wa Hali Bora".

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iii) Whether the applicants are entitled to be granted the prayers sought.

The application was challenged by a counter affidavit of Frolence Saivoiye Yamat, the respondent's Principal Officer who disputed all the material facts of the affidavit and put the applicants in strict proof.

The application was argued by a way of written submissions. The applicants were represented by Mr. Mussa Kiobya, Advocate while respondent was represented, by Mr. Zakia Seleman Mloy, State Attorney.

Arguing in support of the application, on first issue raised in the affidavit on the validity of 12 months compensation, Mr. Kiobya submitted that the arbitrator erred in law by awarding 12 months compensation, while the same was not pleaded under CMA F.1 as the claim. In such circumstances whereby arbitrator found that the retrenchment was both substantively and procedurally unfair he ought to have awarded reinstatement as prayed by the applicants, and that the arbitrator had a duty to give reason to explain why he could not order reinstatement. Supporting his submission, Mr. Kiobya cited the case of **Tanga Cement Company Limited v.**

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Christopherson Company Limited, Civil Appeal No. 77 of 2002 (unreported).

On second issue, relating to Collective Bargaining Agreement (Mkataba wa Hali Bora), Mr. Kiobya argued that the respondents acted contrary to the agreement by not considering Clause 12:1 (iii) (a) (b) of the CBA (Mkataba wa Hali Bora) which guides other terminal benefits, including repatriation allowance apart from the 12 months compensation, to be paid in case of any retrenchment exercise. Strengthening his argument, he cited the case of **Simoni Kichele Chacha v. Avelina M. Kilawe**, Civil Appeal No. 160 of 2018, Court of Appeal of Tanzania (unreported).

Regarding reliefs sought, it was submitted that since the applicants' prayer was to be reinstated and the arbitrator failed to do so, Mr. Kiobya is of the view that as the applicants were unfairly terminated substantively, the CMA award has to be revised. He referred this Court to Section 94 of the Employment and Labour Relation Act. Cap 366 R.E 2019 which confers revisional power to the court. He further cited the case of **National Bank of Commerce (NBC) Ltd. v. Mariamu Mabula**, Revision No. 916 of 2018, High Court of Tanzania, at Dar es salaam, (unreported) where the court ordered

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that after being unfairly terminated, the employees were entitled to reinstatement without loss of remuneration.

In the alternative, Mr. Kiobya submitted that if the court finds it difficult to order reinstalment, then the Applicants should be awarded all terminal benefits which include repatriation allowances and subsistence allowances. He cited the case of **Mvomero District Council vs Thobias Liwongwe and 6 Others, citing the case of 151 of 2017, Paul Yustus Nchia vs. National Secretary CCM and another, Civil Appeal No. 85 of 2005 Court of Appeal of Tanzania** where it was held that employees are entitled to repatriation costs and subsistence allowances.

Submitting on the issue of Collective Bargain Agreement (Mkataba wa Hali Bora) Mr. Kiobya submitted that it is in the agreement that the applicants will be repatriated to their places of domicile in case of retrenchment. Supporting the binding effect of Mkataba wa Hali Bora Mr. Kiobya cited the case of **Simon Kichele Chacha vs. Aveline M. Kilawe, Civil Appeal No. 160 of 2018, Court of Appeal of Tanzania (Unreported)** where it was held that parties are bound by their agreements as a cardinal principle of the Law of Contract.

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Mr. Kiobya therefore prayed for the Court to quash and set aside the decision of the CMA.

Arguing against the application, Ms. Zakia Mroy submitted with regards to the first point on reinstatement that it is upon the discretion of the arbitrator to order reinstatement, re-engagement or payment of twelve months compensations to an employee after retrenchment as the same is well provided under **Section 40 of the Employment and Labour Relation Act. Cap 366 R.E 2019**.

Ms. Zakia went on to submit that the arbitrator was right not to reinstate or re- engage the applicants as the employer had already undergone a series of reforms and restructuring with no room for the applicants to work. She added that as there was justifiable reason for retrenchment, it was only procedure which was not fully adhered to as stated in the last two pages of the CMA award. On such basis Ms. Zakia is of the view that the arbitrator was right by awarding compensation of 12 months. Backing up her submission she cited the case of **Boni Mabusi v. The General Manager (T) Cigarettes Co. Ltd.,** Consolidated Revision No. 418 and 619, High Court of Tanzania, at Dar es Salaam.

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As to the second ground concerning insufficiency of awarding only 12 months salaries compensation, Ms. Zakia Mroy submitted that the payment of other benefits as per the voluntary agreement was not among the issues to be decided by the Commission and was never pleaded anywhere. Therefore, the same cannot be raised at revisional stage. In supporting her argument, she referred this Court in the case of **Remigious Muganga v. Barrick Bulyanhuru Gold Mine,** Civil Appeal No. 47 of 2017, Court of Appeal of Tanzania, at Mwanza.

The Applicants filed a rejoinder. The contents of the said rejoinder will be taken into consideration in determining this application.

Having gone through the parties' submissions and their sworn statements together with the record of the CMA, I am inclined to address two issues. The **first** issue is **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award** and **secondly, to what reliefs are parties entitled**?

In answering the first issue, I will start to answer the question as to whether the arbitrator had justification to award 12 months compensations disregarding the applicants' prayer for the reinstatement as their best option. In cases of unfair termination, labour law is exhaustive regarding the issue of remedies. The

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relevant provision is section **40 (1) of the Employment and Labour Relation Act, Cap 366 R.E 2019** which provides:-

S. 40. -(1) Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer:-

(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or (b) to re-engage the employee on any terms that the arbitrator or Court may decide; or

(c) to pay compensation to the employee of not less than twelve months remuneration.

(2) An order for compensation made under this section shall be 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.

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From the above provision the remedies under **Section 40 (1) (a) to (c) of Cap 366** are alternatives which the arbitrator may opt. It is therefore the discretion of the arbitrator to order reinstatement, or

re-engagement or payment of twelve months compensations to an employee after finding the termination to be unfair.

It is undisputed that there was a structural reform which prompted the changing of the 1st Respondent from DAWASA to the name of the 2nd Respondent DAWASCO where employees had to shift from DAWASA to DAWASCO. It is a common fact that these changes came with other events which necessitated the retrenchment exercise. In such circumstance, the retrenchment was inevitable. This justifies arbitrator's findings that there was a valid reason of termination due to the said changes (structural reform) although procedurally unfair. At this aspect, the Arbitrator was correct to hold that there was a fair reason to terminate the Respondents.

As to whether the award of 12 months salary was a proper decision or not, this takes me to the matter of reliefs associated with retrenchment.

The question of reliefs associated with retrenchment is guided by **Section 40 (1) of the Employment and Labour Relations Act as cited above.** The law confers some discretion to the arbitrator to assess the award according to each circumstance of the case. The reliefs enumerated at Section 40 (1) uses the word "or" to indicate

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that the reliefs should be awarded in alternative. One cannot awards reinstatement and compensation at the same time. Ordering compensation was within the discretion of the arbitrator which the courts should avoid interfering if not illegally exercised. Since the arbitrator found the retrenchment to have been done with a fair reason. In my view, the arbitrator fairly and reasonable exercised the CMA discretion by awarding compensation of twelve months salaries in alternative to re-instatement. She could offer a more stringent award against the Respondents if termination was unfair both substantively and procedurally. In my view, 12 months salaries compensation was just and fair.

With regards to the **second** issue of affidavit as to whether the arbitrator was right for having not considered the Applicant's entitlements under "Mkataba wa Hali Bora", the Applicants challenged the decision of the arbitrator for having failed to award subsistence allowance and repatriation costs. As to why the arbitrator failed to order payment of repatriation and subsistence allowance, and other benefits in accordance with "Mkataba wa Hali Bora", the Respondent is of the view that these prayers were not pleaded.

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It is a cardinal principle of law that parties are bound by their own pleadings. Departure regarding prayers should be accompanied with a valid reason. The Court of Appeal insisted this position, in the case of **Joram Molel v. Everest Chinese,** Civil Appeal No. 24/2008 where it was held that:-

> *"It should always be borne in mind that, a court of law is not a charitable institution. Its duty in civil cases is to render into everyone according to the proven claim. It is trite law that a court is not a Father Christmas sought not to go about granting to parties' reliefs which they have not asked for. A court is powerless to a claimant what he did not claim or grant an unsought relief."*

The above cited case maintained the well-known principle, that parties are supposed to be awarded what they prayed and not otherwise. In this application according to **CMA Form No. 1** the applicants herein prayed for reinstatement and compensation. It is already stated that the law provides for compensation as an alternative to reinstatement **(See Section 40 (1) of Cap 366).** The arbitrator correctly chose the right option basing on the applicants' prayers and ordered 12 months compensation as stated at page 20 of

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the CMA award after finding the termination was only procedurally unfair. There was no other prayer in Form No. 1. It has to be noted that this form is considered as a plaint in the CMA. In some decision, this court has numerously found the employers to be liable to, in addition to compensation, pay the statutory benefits even when they are not included in the CMA Form No 1. (**See Eddy Martin Nyinyoo V. Real Security Group & Marine, Lab. Rev. No 114/2011, [2013] LCCD 1; Pyrethrum Company of Tanzania Ltd. V. Edda Nyalifa, Lab. Rev. No. 181/2013, LCCD 2013 and National Microfinance Bank Versus Ediltruda Nemes Lyimo (Administrator Of The Estate Of Late Eliaringa Ngowi) Rev. No. 705 Of 2019 LCCD 2019).**

The situation in this matter is different because the matter is raising contentious facts at this revisional stage. While the Applicants claims to have not been paid the terminal benefits as per the "Mkataba wa Hali Bora", the Respondent submitted that all the payments were made to the applicants in accordance with "Mkataba wa Hali Bora" when retrenchment was effected. The Counsel attached with the submission a letter of one of the Applicants by the name of Sospeter Godon Mugungo who is among the applicants who are represented

pursuant to the **Application No. 475 of 2020,** which was an application for representative suit. The letter shows payment of all statutory benefits to have been duly paid. This contention indicates that there is a need of evidence to be adduced to ascertain the truth. This Court being a revisional Court, evidence cannot be taken. It ought to have been given in the CMA as a first instance forum.

The issue of repatriation and subsistence allowance did not feature at all in the CMA. The disagreeing facts of the parties make it uncertain as to whether the claims were unsettled or were already paid making it not an issue at that material time.

In the spirit of the above-named decision of **Joram Molel v. Everest Chinese supra),** the Applicants are precluded from claiming new remedies which needs to be proved by evidence at this stage of revision. In the results, I see no reason to fault the decision of the arbitrator on this aspect.

From the above legal reasoning, since repatriation and subsistence allowances were not among the applicant's prayers filled in a CMA Form No. 1, and never raised as an issue which was settled by evidence in the CMA, I find nothing wrong on the arbitrator in not awarding what was not contentious in the CMA.

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Further to the aforesaid, dealing with the entitlements under the "Mkataba wa Hali Bora" forms part and parcel of the consultation meeting, under the process which is well coached under **Section 38 (2), (3) of the Employment and Labour Relation Act, Cap 366 R.E 2019**. The relevant provision directs that if no retrenchment agreement reached between the parties then the matter should be referred by the parties to the mediation if the mediation failed, then the matter should be referred to the arbitration which shall be concluded within thirty days during which period no retrenchment shall take effect and, where the employees are dissatisfied with the award and are desirous to proceed with revision to the Labour Court under **section 91 (2) of the Employment and Labour Relation Act, Cap 366 R.E 2002**, the employer may proceed with their retrenchment.

In this application the procedure was not followed by the applicants after being aggrieved. Therefore, claiming for the entitlements under Mkataba wa Hali Bora at this stage without referring it to the CMA for mediation is an afterthought and cannot be entertain by this court by a way of revision. For that reason, the Applicant's regarding claims hold no water.

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From the foregoing, having found that the arbitrator was correct in awarding only compensation and that he was right in not awarding repatriation costs and subsistence allowance for not being contentious in the CMA, the issues as to **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award** is a answered in the negative.

As to relief, regarding to the prayers sought, the only remedy available in this application is to hold it not sufficiently founded. The Application is therefore dismissed. The decision for the Commission for Mediation and Arbitration is hereby upheld. Each party to the suit to take care of its own cost. It is so ordered.

Dated at Dar es Salaam this 15th day of June, 2022.

KATARINA REVOCATI MTEULE

JUDGE

15/06/2022

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