IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 246 OF 2021

(From the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni dated 28th day of December 2020 in Labour Dispute No. CMA/DSM/KIN/551/2020/227/20 by (Ng'washi: Arbitrator)

BETWEEN

CHACHA PETRO
NICOLAUS YOHANA ..... **APPLICANTS**
SECILIA MASEMBA & 37 OTHERS

VERSUS

FINCA MICROFINANCE BANK LIMITED.....RESPONDENT

JUDGEMENT

24th June 2022 & 28th June 2022

K. T. R. MTEULE, J.

This Revision application emanates from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni (CMA) in Labour Dispute No. CMA/DSM/KIN/551/2020/227/20. The prayers contained in the Chamber summons are:-

1. That this Honorable Court be pleased to call for records and proceedings of the Commission for Mediation and Arbitration, in Labour Dispute No. CMA/DSM/KIN/551/2020/227/20 between Finca Microfinance Bank Limited v. Chacha Petro and 38 others,

revise, quash and set aside the whole award by Hon. Ng'washi Y, Arbitrator dated 28th December 2020.

The brief background of the dispute leading to this application is grasped from CMA record, affidavit and counter affidavit filed by the parties as stated hereunder. The applicants were employed by the Respondent in divest periods holding different positions. On 29th June 2020, they receive a notification for a staff meeting to be held on 1st July 2020. That the meeting was convened and an agenda of an intended retrenchment was tabled. Upon discussion, no consensus was reached amongst the parties as the Applicants herein questioned the criteria used to retrench the selected staff and further demanded payment of 10 months salaries on top of the statutory benefits. This prompted the Respondent to lodge a complaint in the Commission for Mediation and Arbitration praying for a declaration that all employees are entitled to statutory packages and that the Respondent was unable to make more payments other than the statutory benefits.

The settlement of the dispute failed during the compulsory mediation process hence the Respondent referred the dispute to the arbitration process vide Labour Dispute No. CMA/DSM/KIN/551/2020/227/20. The Arbitrator issued a decision in favour of the Respondent (the

Employer who was the Applicant therein) where she found all procedures of retrenchment to have been complied with and allowed the retrenchment to be implemented within 14 days from the date of the decision. The arbitrator further ordered the Respondent (Applicant therein) to pay the statutory benefits to the Applicants namely notice, leave if any and severance pay. Consequently, the Applicants were retrenched for the reason of financial constraints affecting the Respondent's business operations and upon the order of the CMA.

The CMA decision aggrieved the Applicants hence the present application. At paragraph 12 of their affidavit, the Applicants advanced four grounds of revision which can be paraphrased as follows:-

i) That the Arbitrator exercised her jurisdiction illegally, with material irregularities and delivered erroneous decision that the respondent had valid reasons to proceed with retrenchment process.

ii) The arbitrator failed to properly analyse the evidence on record to arrive at a right decision.

iii) That there was a misconduct on the part of the Arbitrator for failing to properly record the evidence of the applicants.

iv) That the Arbitrator acted illegally by awarding remedies which were never prayed for by the respondent in his CMA F1 or in the open statement as provided for under the law.

Both parties to the application were represented. The Applicants were represented by Mr. Remmy William, Advocate, whereas the Respondent was represented by Mr. Evodi Mushi, Advocate. Upon prayers by the parties, the Court ordered for the application to be disposed of by a way of written submissions. I thank both parties for complying with the Court's schedule, and I appreciate their rival submissions which will be considered in determining this application.

Guided by the submissions made by both parties, the applicant's affidavit, the Respondent's counter affidavit and CMA record, I formulate one issue for determination which is **whether the applicants have provided sufficient ground for this Court to revise the CMA award.**

In approaching the above issue, the grounds identified in the affidavit will be considered one after another. The first ground concerns the fairness of the retrenchment. It is known that fairness is assessed in two aspects which are procedure and reasons. In the CMA, the fairness of the reason was not a matter for determination. It does not

appear anywhere in the CMA that retrenchment was not a necessity in the Employers organization. It was neither disputed nor was it framed as an issue in the CMA. Although parties are trying to convince this Court to address it, I will not do that being a new thing at revisional stage. The first legal issue of the affidavit is answered in the negative. I see no error on the arbitrator's decision that the retrenchment was based on reasonable cause.

Under the **second** legal issue forming the ground of revision, the arbitrator is criticised for having not properly analysed the evidence on record. I have gone through the decision of the arbitrator. The arbitrator was guided by the evidence including that of Deusdedit Edward "PW1" who stated that 40 notice of intention to retrench were issued to the employees. They were admitted as exhibit F2. PW1 is also recorded to have stated that the principle of LIFO, (Last in last out) was followed. The arbitrator further relied on Exhibit F3 which indicates how LOFO was complied with. I could not see where the arbitrator went wrong in analysing the evidence. She properly determined the matter basing on the facts surrounding the retrenchment exercise and what was stated in the CMA. I see no reason to fault the arbitrator's findings on this ground as evidence was properly analysed.

Under the third legal issue of affidavit, the applicants complained that the arbitrator awarded what was not sought by the applicant in the CMA. It is not disputed that what the instant respondent sought in the CMA were:-

a) Declaration that all stuff in attached list are entitled with statutory package in retrenchment process done by employer,

b) Declaration that employer is not capable to pay additional of 10 months' salary in retrenchment package to all stuff due to financial constraints, hence, to proceed with retrenchment process to all stuff in the list.

The complainant in the CMA was ordered to proceed with retrenchment and pay the employees the statutory benefits which are notice, leave, and severance pay. In what is granted or ordered by the arbitrator was not outside the prayers sought by the employee. The prayers were to allow payment of statutory benefits and proceed with retrenchment and this is what the arbitrator granted. As well I see no reason to differ with the arbitrator at this point.

While arguing the first issue on the evidence evaluation, the counsel for the Applicants stated at lengthy the fairness of reason and the

procedure. In the CMA, the reasons for retrenchment was not at issue. I would like to point out that dealing with fairness of reasons will be amounting to a creation of a new matter at the revisional level which is not appropriate legally. The law is settled on this aspect. (See **Makori Wassanga v. Joshua Mwaikambo and Another** [1987] TLR 92; **Peter Ng'homango v. Attorney General,** Civil Appeal No. 114 of 2011, (CAT), DSM (unreported); and that of **Astepro Investment Co. Ltd v. Jawinga Investment Limited,** Civil Appeal No. 8 of 2015, (CAT), DSM (unreported)}. I find no need for this Court to labour on a matter which was not an issue in the forum of the first instance or on undisputed facts.

On procedural fairness of the retrenchment, the legal position is that even when there is a fair and valid reason to retrench some employees, the exercise must adhere to mandatory procedures provided by the law. Retrenchment procedures are guided by **section 38 of the Labour and Employment Relations Act** (Cap 366 of 2019 R.E.) read together with **Rules 23 and 24 of the Codes and the Guidelines under the Employment and Labour Relations (Code of Good Practice) GN. 42 of 2007**. Section 38 provides:-

"Section 38 (1) in any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, be 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;

(v) severance pay in respect of the retrenchment.

From the above position, in establishing the validity and fairness of retrenchment exercise, the responsible authority must observe the integrity of the entire process as prescribed in Section 38. Even when there is a fairness of the reason, the termination can still turn out to be unfair if the employer fails to act in compliance with the procedure and the steps required.

I have noted from the CMA record that there was a meeting which was held to discuss the retrenchment as evidenced by Exhibit F-3 (minutes of consultative meeting). Evidence reveals further that the

purpose of the meeting was to inform the affected parties about the reason for retrenchment, any measures taken to avoid or minimize the intended retrenchment, the method of selection of the employees to be retrenched, the timing of the retrenchments and severance pay in respect of the retrenchment.

It appears that only to employees who were intended to be retrenched were invited to the meeting.

Despite of this irregularity, the arbitrator was of the opinion that the procedure should not be followed in a check list fashion. She referred to the case of **Bernard Gindo and 27 others v. TOL Gases Ltd.**, Revision No. 18 of 2012, High Court, Labour Division at Dar Es Salaam. In this case, this Court observed that various prescribed stages are not meant to be applied in a check list fashion, rather are meant to provide guidelines to ensure that the consultation is fair and adequate in retrenching employees. Having considered the extent of the involvement of the applicants in the retrenchment and the extent of consultation, the arbitrator found the procedure to be fair.

In the strength of the decision cited by the arbitrator and taking into account that no prejudice occasioned to the applicants in not issuing

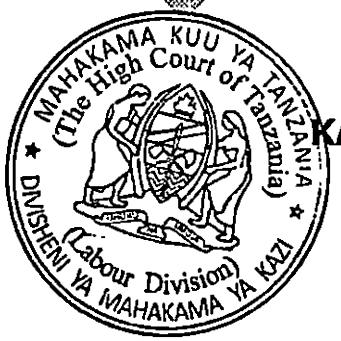
the notice to all the employees, I see no reason to differ with the arbitrator's opinion on the fairness of the retrenchment procedure.

With regard to reliefs of the parties, the Arbitrator being concerned with the financial situation of the Respondent, did order the employer to pay only the statutory payments without making addition of 10 months salaries which was the point of misunderstanding in the consultation meeting. In my view, since the termination was fair in both reasons and procedure, payment of terminal benefits as provided under Section 44 of the Employment and Labour Relation Act, Cap 366 R.E 2019 is sufficient in this matter.

On the above reason I uphold the decision of the Commission for Mediation and Arbitration. The application has no merit, and it is dismissed accordingly. Each party to take care of its own cost.

It is so ordered.

Dated at Dar es Salaam this 28th day of June, 2022.



KATARINA REVOCATI MTEULE
JUDGE
28/06/2022