IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 432 OF 2021

INTERGRATED SECURITY SYSTEM LTD ..... APPLICANT

VERSUS

ANETH BURTON KYUSA ..... RESPONDENT

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

(Makanyanga, Arbitrator)

Dated 23rd September, 2021

in

REF: CMA/DSM/ILA/65/2020/87

JUDGEMENT

03rd June & 01st July 2022

Rwizile J

The applicant, **INTERGRATED SECURITY SYSTEM LTD** pleaded this Court to call for, revise and quash the proceedings and ruling of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/ILA/65/2020/87.

It has can be briefly stated that the respondent was employed by the applicant. In the course of their employment relationship, the respondent was retrenched. The respondent was aggrieved by retrenchment, she filed

a Labour Dispute at CMA. The award was in her favour, however, the applicant was not happy with the decision, hence this application.

The application is supported by the affidavit of Thomas Paul Chizi, officer of the applicant. The respondent opposed the application by filing a counter affidavit. Grounds for the revision raised are as follows: -

i. *Whether the applicant had established a fair reason for retrenchment.*
ii. *Whether the applicant followed a fair procedure for retrenchment of the respondent.*

The application was by way of written submissions. The applicant was represented by Mr. Method Ezekiel Garran, learned Advocate of Ventrix Law Attorneys, whereas the respondent enjoyed the services of Mr. Boniphace Erasto Meli, learned Advocate of Kings Law Chambers.

Mr. Method for the applicant submitted that the employment contract of the respondent was terminated for operational requirement. The applicant, he commented, had reasonable grounds for termination and followed necessary procedure stipulated under section 38(1)(a), (b) and (c)(i) of the Employment and Labour Relation Act (ELRA), [CAP. 366 R.E. 2019]- and Rule 23(1) of the Employment and Labour Relation (Code of

Good Practice) G.N. No. 42 of 2007. He stated further that the arbitrator did not consider evidence tendered which showed debts of the company and also the death of its founder.

On the other point, he stated that the respondent was given notice prior retrenchment and that they did not disclose financial statement as it is a classified information because it may endanger the business.

To support that assertion, this court was referred to Rule 56(6) and (7) of G.N. 42 of 2007. The learned counsel was therefore of the view that the arbitrator was biased in reaching at the unjust decision.

Mr. Boniphace learned counsel who stood for the respondent in response to the first point, stated, the applicant did not show which evidence was misapprehended by the arbitrator. He continued to argue that, it is the duty of the employer to prove that there were valid reasons for termination, as held in the case of Clare **Haule v Water Aid Tanzania,** Revision No. 13 of 2019 (unreported) which was cited in the case of **Security Group (T) Ltd v Florian Modest Shumbusho and Another,** Revision No. 302 of 2014, High Court Labour Division (unreported).

More, the learned counsel added that since the applicant failed to prove the case, it was justifiable for the arbitrator to pronounce the judgement

in favour of the respondent. To cement his position, I was referred to the case of **Hemedi Saidi v Mohamedi Mbilu** [1984] TLR 113.

Mr. Boniphace cited section 38 of ELRA and Rule 23(1), (2), (3), (4), (5), (6) and (7) of G.N. No. 42 of 2007 and held the view that it was the duty of the employer to make sure the procedures for termination or retrenchment were followed. He said, there was no notice to employees to attend a consultation meeting prior retrenchment and no retrenchment agreement between them.

He submitted that the notice of termination dated 04th October, 2019 tendered by Dw1 was admitted as exhibit S1 and the purported consultation meeting was conducted on 11th December 2019, which is after termination.

To strengthen his submission, he further referred to the case of **Clare Haule v Water Aid Tanzania** and **Security Group (T) Ltd v Florian Modest Shumbusho and Another (supra)** where it was held that: -

> *"Consultation meeting was just a meeting for the purpose of showing that the retrenchment procedures was adhered and not called for the purpose of joint exercise to reach an agreement as provided by G.N. NO. 42 of 2007 in rule 23(4)"*

He was then of the view that the company does not die or cease to exist unless it is specifically wound up or the task for which it was formed came to an end. He also added that death or insolvency of the owner/member of the company does not affect the existence of the company.

Dealing with the second ground, he submitted that, it was raised before this Court for the first time. He insisted that it was not raised at CMA or in the affidavit. He stated further that no section in labour laws that bars employers to tender documentary evidence as held in the cases of **Junior Construction Company Lomited v Revocatus Bebile,** Labour Revision No. 02 of 2018, High Court Labour Division at Bukoba (Unreported), **Mandavin Company Ltd vs General Tyre (E.A) Ltd,** Civil Application No. 47 of 1998 which was cited with approval by the CAT in the case of **Gilbert Zebedayo Mrema vs Mohamed Issa Makongoro,** Civil Application No. 369/17 of 2019, and the case of **Unlodge En Afrique Ltd v Salehe Sharif Burhani,** Labour Revision No. 69 of 2020 HC Labour Court at Arusha. He finalized by praying the Court to dismiss this application.

After going through parties' submissions, it is important to note that

retrenchment is one form of termination of employment. It has therefore to comply with laid down rules of procedure to be considered fair. In particular, Rule 23(1) of G.N. No. 42 of 2007 provides that;

> *"A termination for operational requirements (commonly known operational as retrenchment) means a termination of employment arising from the requirements 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."*

The reasons as stated in the law have to be proved. It is the duty of the employer to prove reasons for retrenchment. To do so, the applicant tendered Dw1 who said, the applicant experienced economic breakdown due to the death of its founder. Yes, this may be a good reason but it has to be proved. To prove that there was death of the founder of the company alone is not sufficient evidence showing economic problems. The debt of the company was something that can be proved by documentary evidence. Dw1 did not procure any such evidence. I do not think, his evidence was therefore clear and convincing. I think, the first issue has not been answered in the affirmative.

On the second issue of whether procedure for retrenchment was followed, for such termination to procedurally hold, there is need to comply with section 38(1) of ELRA read with Rule 23(4), (5) and (6) of G.N. No. 42 of 2007. The employer is required to take the following two steps upon contemplating retrenchment;

(a) give notice to employees of any intention to retrench as soon as it is contemplated,

(b) disclose to them, all relevant information on the intended retrenchment for the purpose of proper consultation.

Upon complying with the first two above stated procedure, the employer has to state in clear terms;

(i) the reasons for the intendent retrenchmen.,

(ii) any measures to be taken to avoid or minimize the intendent retrenchment,

(iii) the method to be used to select employees to be retrenched,

(iv) the employer has to explain why retrenchment at the time it is to be done,

(v) whether there is payment of severance allowance,

(vi) consult with the trade union recognized at the work place with the majority of the workers or,

(vii) in another way consult with employees not represented by a recognized or registered trade union.

Going through CMA records, it is noted that on 04th October, 2019 the applicant gave a notice of intention to make retrenchment by stating different posts to be affected and also stating jobs which will be available for anyone who will be affected with retrenchment to apply. The notice was marked as exhibit S1. The same was followed by the company meeting, which was held on 11th December, 2019, exhibit S2. In the meeting the reason for retrenchment was stated as follows;

"Kampuni uendeshaji kushuka – kipato cha kampuni imeshuka kwasababu ya kulipa madeni hasa N.S.S.F. madeni yamesababisha kipato cha kampuni kushuka ili kulipa haya madeni kampuni imeona itoe upunguzo wa wafanyakazi."

Therefore, based on the above extract of evidence, the applicant had debts due for payment to the National social Security Fund. And in exhibit S2 it shows the workers' opinion on the matter were presented. At the

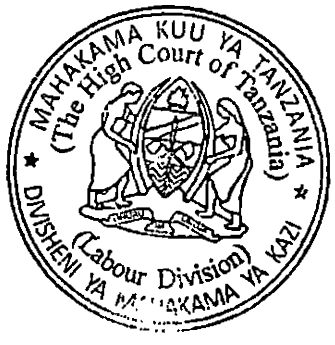
end of exhibit S2 the applicant told the workers of her intention of calling them one by one. For easy reference (untyped proceedings): -

> *"HATUA ILIYOBAKIA- Uongozi utaongea na mfanyakazi mmoja mmoja. Wafanyakazi msipate mshituko.*
>
> *Kikao kimefungwa saa 13:28hrs."*

From that meeting then came termination as proved by exhibit S3 which is a termination letter. The exhibits tendered at CMA by the applicant were S1, S2 and S3. The applicant, in my view did not comply with the laid down procedure. My first doubt comes, the notice of retrenchment announced posts to be retrenched. At the same time, it made an announcement that certain posts will be available for the retrenched to apply, if the same will qualified and were to be considered. In the termination letter, this notice was referred. But in the meeting, the reasons stated was not structural but rather economical. If it were structural then one sees the need of retrenchment to some of the staff in certain cadres while maintaining some other posts and then advertise them to get the qualified candidates.

In this case, I think, the reasons stated for retrenchment did not match the needs of retrenchment. I therefore hold that there was no proved

valid reason for termination. Therefore, there was no valid reasons for termination. Like the CMA, I think, termination was not fair. The application has no merit. It is therefore dismissed, no order as to costs.



A.K. Rwizile

JUDGE

01.07.2022