IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 64 OF 2022

(Arising from an Award issued on 10/12/2021 by Hon. William R, Arbitrator in Labour dispute No. CMA/DSM/ILA/670/2020/344 at Ilala)

BETWEEN

MSIMBAZI CREEK HOUSING ESTATE LTD ..... APPLICANT

AND

JOHNSON EDSON KATEGELA ..... RESPONDENT

JUDGMENT

Date of the last Order: 30/06/2022
Date of Judgment: 22/7/2022

B. E. K. Mganga, J.

On 6th January 2020, applicant entered a fixed term contract with the respondent as electrical engineer, but the said contract was terminated on 20th July 2020. Aggrieved by the said termination, on 2nd September 2020, respondent filed Labour Complaint No. CMA/DSM/ILA/670/2020/344 before the Commission for Mediation and Arbitration henceforth CMA at Ilala complaining that his employment was unfairly terminated. In the Form referring the dispute to CMA

hereinafter referred to as CMA F1, respondent indicated that he was claiming to be paid (i) salary in lieu of notice, (ii) 36 months' salary as compensation and (iii) TZS 100,000,000/= as general damages. In the said CMA F1, respondent indicated further that the procedure for termination was not followed because he was neither consulted nor termination package agreed upon by the parties. He indicated further that he was not given right to be heard and that the reason for termination was not justified.

Having heard evidence of the parties, on 10th December 2021, Hon. William R, Arbitrator, issued an award that termination of employment of the respondent was unfair for want of reasons and awarded the respondent to be paid TZS 18,000,0000/= as 12 months' salary compensation.

Applicant was aggrieved by the said award, as a result, she filed this application seeking the court to revise it. In the affidavit of Mustafa Dharamsi, the director of the applicant in support of the Notice of the Application, raised 4 grounds namely: -

1. *That the Honourable Commission erred in law and facts by failing to appreciate that nothing in the respondent's contract entitled him to work indefinitely for the applicant.*
2. *That the Commission erred in law and facts by failing to appreciate that since there was no general retrenchment, telephone call from the*

chief Executive of the applicant company plus a written notice constituted full and lawful consultation to the respondent.

3. *That the Commission erred in law and facts by failing to appreciate that the respondent was fully compensated for the short period of less than eight (8) months that he worked for the applicant.*
4. *That the Commission erred in law and facts by issuing an award that failed to acknowledge that respondent had already been duly and fully compensated.*

By consent of the parties, the application was argued by way of written submissions.

In the written submissions, Mr. Shuma Kisenge, advocate for the applicant submitted that the above grounds raise three issues namely: -

1. *Whether the respondent was unfairly terminated*
2. *Whether the Commission's findings and decision were justified and*
3. *What reliefs are the parties entitled to.*

On the issue whether, the respondent was fairly terminated and whether, the Commission's findings were justified, Mr. Kisenge, learned counsel for the applicant submitted that the arbitrator erred to hold that there was no valid reason for termination and that procedures were not adhered to. Counsel for the applicant submitted that reason for termination was operation requirement due to the impact of Covid-19 pandemic. Counsel criticized the arbitrator that he ignored the evidence relating to impact of Covid-19 pandemic to the business environment as was testified by DW1 but chose to accept evidence of the respondent

(PW1) who testified that business was good. Mr. Kisenge submitted further that, the arbitrator failed to take judicial note of a facto r that affected the operating environment of the applicant but considered extraneous factors relating to contracts the applicant entered with various persons or entities.

Counsel for the applicant submitted further that respondent did not tender evidence to prove that he belongs to a certain trade union or that the said union was not afforded an opportunity to participate in the consultation process or to negotiate on behalf of the respondent. Counsel for the applicant submitted that evidence proved that consultation was done. Counsel went on that, applicant complied with the provisions of section 38(1) of the Employment and Labour Relations Act [Cap.366 R.E. 2019] that requires an employer prior to terminates an employee for operation requirement to (i) give notice of intention to retrench as soon as it is contemplated, (ii) disclose all relevant information on the intended retrenchment for the purpose of proper consultation, and (iii) consult an employee prior to retrenchment or redundancy. Counsel submitted further that, since termination was due to poor business environment namely due to harsh economic circumstances, it would have been superfluous to conduct consultations

concerning measures that would have avoided or minimized the intended retrenchment. Counsel cited the case of ***Veneranda Maro and Another v. Arusha International Conference Centre***, Civil Appeal No. 322 of 2020, CAT (unreported) to support his submission that the arbitrator was supposed to consider all factors and circumstances including economic hardship caused by Covid-19 pandemic in arriving at her decision.

On the relief awarded to the respondent, counsel for the applicant submitted that section 40(1)(c) of Cap. 366 R.E. (supra) provides 12 months' salaries compensation as minimum and that the section does not use the words "shall" instead it uses the word "may" that is not mandatory. He went on that the arbitrator did not exercise her discretion properly in awarding 12 months' salaries compensation.

Responding to the written submissions made on behalf of the applicant, Mr. Sosten Mbedule, learned counsel for the respondent submitted that termination of the respondent was unfair both substantively and procedurally. Counsel for the respondent submitted that applicant failed to adduce evidence to show that she had a fair reason for termination on operation requirement and failed to follow procedures provided for under sections 38 and 39 of Cap. 366 R.E 2019

(supra). Counsel for the respondent cited Rule 23(4) and 23(6) of the employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2007 and submitted that the obligations placed on the employer are both procedural and substantive and that consultation was supposed to be made as soon as the applicant contemplated retrenchment of the respondent. Counsel for the respondent submitted further that there was neither consultative meeting nor protection of the respondent's interest. Counsel argued that respondent was not consulted, rather, was simply informed that he has been terminated. Counsel for the respondent cited the case of ***Visser v. Sanlam*** (2001) 22 ILJ 666 and ***Omari Ali Dodo v. Air Tanzania Company Limited***, labour Revision No. 322 of 2013, HC, (unreported) to bolster his submission that consultation must be made prior to making the decision and that both the employer and the employee must act in good faith. Counsel for the respondent submitted further that, there was no criteria disclosed for retrenchment of the respondent. Counsel argued further that, applicant violated the provisions of Rule 23(a) of GN. No. 42 of 2007 (supra).

On whether the decision of the Commission was justified, counsel for the respondent submitted that applicant failed to disclose economic

hardship. On the relief, counsel for the respondent submitted that the arbitrator considered all factors before awarding the respondent and properly awarded the reliefs sought.

I have examined the CMA record and considered submissions of the parties and find that the central issue of controversy is whether termination of employment of the respondent was fair or not; and the reliefs each party is entitled to.

It was submitted by counsel for the applicant that the reason for termination of the respondent was operational requirement due to Covid -19 pandemic that affected business environment of the applicant. On the other hand, counsel for the respondent submitted that there was no valid reason for termination. I have examined the evidence of Jatius Chavda (DW1), the only witness who testified on behalf of the applicant and find that, in his evidence, he testified that applicant was in hardship because she did not get tenants. Nothing was testified by DW1 relating to Covid-19 pandemic. In his words, DW1 was recorded stating in part: -

> *"**Hali ya kampuni ilikuwa mbaya ambapo hatukuwa na wapangaji** ambayo ilipelekea kuzuka kwa mgogoro huu. Kutokana na hali ya Kampuni kuwa mbaya Chairman Hassan Karim **alimpigia simu Johnson na kumtaarifu kwamba hali ya Kampuni ni mbaya na hivyo alimtaarifu kwamba mwezi unaofuata ataachishwa kazi...**"*

While under cross examination, DW1 admitted that he did not bring evidence to prove that applicant did not have tenants. Throughout in his evidence DW1 did not state that applicant was in economic hardship due to Covid-19 pandemic contrary to what was submitted by Mr. Kissenge. From the above quoted evidence, the reason that was assigned by DW1 was absence of tenants and not Covid -19 pandemic. In my view, the allegation that applicant was in economic constraint due to Covid-19 pandemic is not supported by evidence on record. It is based on submissions from the bar that is not evidence and cannot be acted upon by the court as it was held in the case of ***Dr. A Nkini & Associates Limited v. National Housing Corporation***, Civil Appeal No 75/2015, ***Republic v. Donatus Dominic @ Ishengoma & 6 Others,*** Criminal Appeal No. 262 of 2018, ***Morandi Rutakyamirwa v. Petro Joseph*** [1990] T.L.R 49] and ***the Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman Bunju Village Government,*** Civil Appeal No. 147 of 2006 to mention but a few. In ***Bunju Village's*** case (supra) the Court of Appeal held: -

> *"... submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain*

arguments on the applicable law. They are not intended to be a substitute for evidence".

That being the position of the law, submissions that respondent was terminated due to operational requirement associated with Covid-19 pandemic lacks merit. There is no evidence showing how financial constraint was the cause of termination of just a single employee of the applicant namely the respondent alone and not others. More so, it was not stated by DW1 how absences of tenants was the cause of the selective termination of the respondent alone. In his evidence, DW1 did not also testify as to how many employees were retrenched due to economic constraint. In my view, termination of the respondent was selective and not actuated by real reason of economic hardship. Again, the reason for termination of employment of the respondent is found in the notice for termination (exh. D2) wherein it is stated: -

"... kutoweza kukidhi gharama za uendeshaji wa kampuni..."

DW1 did not explain why the company was unable to afford operational cost. In other words, applicant simply tried to rely on the provision of Rule 23(2)(a) of GN. No. 42 of 2007 (supra) as the reason for termination of employment of the respondent, while in fact it was not. Rule 23(3) and (4) of the said GN. No. 42 of 2007 is clear that the

court should carefully scrutinize a termination based on operational requirement and that the obligations placed under the employer under section 38 of Cap. 366 R.E. 2019(supra) are both procedural and substantive. The reason for that scrutiny, in my view, is to eliminate possibility of employers to use operational requirement as a ground for terminating employment of employees unfairly. Rule 23(3) and (4) of the said GN. No. 42 of 2007 provides: -

"23(3) the courts shall scrutinize a termination based on operational requirements carefully in order to ensure that the employer considers all possible alternatives to termination before the termination is affected.

(4) the obligations placed on an employer are both procedural and substantive.

The purpose of the consultation required by section 38 of the Act is to permit the parties, in the form of a joint problem-solving exercise, to reach agreement on-

(a) the ***reasons for the intended retrenchment*** *(i.e the need to retrench);*

(b) any ***measures to avoid or minimize*** *the intended retrenchment such as transfer to other jobs, early retirement, voluntary retrenchment packages, lay off etc;*

(c) ***criteria for selecting the employees*** *for termination, such as last-in-first-out (LIFO), subject to the need to retain key jobs, experience or special skills, affirmative action and qualifications;*

(d) the timing of the retrenchment

(e) severance pay and other conditions on which termination took place; and

(f) steps to avoid the adverse effects of terminations such as time off to seek work."

In my view, for termination based on operation requirement to be fair, the employer must comply with the above provisions and section 38 of cap. 366 R.E. 2019 that provides: -

"38(1) In any termination for operational requirement (retrenchment), the employer shall comply with the following principles, that is to say, he shall-

(d) ***give notice****, make the disclosure and* ***consultant,*** *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 required by a recognized trade union;

(iii) ***any employee not represented by a recognized or registered trade union****.*

In the application at hand, all the above provisions of the law were not complied with. As pointed out hereinabove, in the notice of termination (exh. D2), applicant did not give explanation exactly what caused the applicant to be in the alleged state of financial constraint. In my view, it cannot be assumed that it was due to Covid-19 pandemic as Mr. Kisenge learned counsel for the applicant wants this court to believe. Had that been the case, it could have been expressly stated in exhibit D2, but it was not. On the other

hand, respondent testified that applicant had no valid reason for termination. I, unqualifiedly, agree with him and the conclusion reached by the arbitrator that there was no valid reason for termination. The applicant was duty bound to prove that there was valid reason for termination as provided under section 37(2)(a) of Cap. 366. R.E. 2019 (supra). In the application at hand, applicant failed to discharge that duty.

It was submitted by counsel for the applicant that the respondent was given a notice, but counsel for the respondent was of the view that, no notice was served to the respondent. It is clear from evidence of both DW1 and PW1 that respondent was informed over the phone that his employment will be terminated on operational requirement and that, on the same date, respondent was served with notice of termination (exh. D2). It is clear in my mind that, applicant contacted the respondent while she has already decided and further that respondent was not consulted. Applicant was supposed to consult the respondent and agree as to what should be done in the situation if at all both has to agree that applicant was in economic constraint. In short, there was no notice envisaged under section 38(1)(d) of Cap. 366 R.E. 2019. Applicant was supposed to give advance notice to the respondent and

consult *inter-alia* whether, they can agree on measures to avoid or minimize the intended retrenchment, such as transfer to other jobs, early retirement, voluntary retrenchment packages, lay off etc as provided for under Rule 23(4)(b) of GN. No. 42 of 2007 (supra), but this was not done. More so, in his evidence, DW1 did not disclose the criteria the applicant used in retrenching the respondent. From the evidence of DW1, it is clear that the decision to terminate employment of the respondent came out of the blue. That was not, in my view, in compliance with the above quoted rule. I therefore hold that applicant selected and terminated employment of the respondent simply she wanted the respondent to be terminated. That was not a fair cause for selection. I therefore associate myself with the holding in the case of Viser (supra) and Dodo (supra) cited by counsel for the respondent. The position I have taken was also held in the South African case of ***Justice Qalukwenza Sindane & Another vs. ABV Brands (PTY) Ltd, D1167/2017*** where it was held that: -

> *"The applicants are justified in complaining that there was no fair process and that they were* ***selected for retrenchment simply on the basis that the respondent decided that their positions were redundant*** *and that they have therefore been selected for retrenchment. In conclusion the respondent failed to justify its selection criterion as fair and objective. The respondent failed to meaningfully consult with the two applicants. The*

respondent failed to justify the dismissal of the two applicants as substantively and procedurally fair". (Emphasis is mine)

From what I have discussed hereinabove, I find that termination of the respondent was both substantively and procedural unfair and uphold the CMA award. I therefore dismiss this application for being devoid of merit.

Dated at Dar es Salaam this 22nd July 2022.

B.E.K. Mganga
JUDGE

Judgment delivered on this 22nd July 2022 in chambers in the presence of Shuma Kissenge, Advocate for the applicant and Jema Bilegaya, Advocate for the respondent.

B.E.K. Mganga
JUDGE