IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 112 OF 2021

(From the decision of the Commission for Mediation and Arbitration of DSM at Ilala) (Msina: Arbitrator) dated 24th February 2020 in Labour Dispute No. CMA/DSM/ILA/1110/19/45/2020

BETWEEN

MOHAMED ENTERPRISES (T) LTD .....APPLICANT

VERSUS

KASSIM S. ATHUMAN & 8 OTHERS.....RESPONDENTS

JUDGEMENT

K. T. R. MTEULE, J.

25th July 2022 & 26th July 2022

This decision concerns revision application arising from the award issued in Labour Dispute No. CMA/DSM/ILA/110/19/45/2020 in the Commission for Mediation and Arbitration of Dar es Salaam, Ilala (herein after referred to as CMA). Aggrieved with the award the applicant has filed this application under the provisions of **Rules 24 (1), (2), (a), (b), (c), (d), (e), (f), (3), (a), (b), (c), (d) and 28 (1) (c) (d) and (2) of the Labour Court Rules, GN. No. 106 of 2017 and Sections 91 (1) (a) (b), (2) (a), (b) and (c), (4) (a) and (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act No. 6 [CAP 366 RE. 2019] (Cap 366)** praying for

the orders of this court to call for the CMA record of the aforementioned Labour Dispute, revise the proceedings; quash and set aside the award thereon and for orders granting any other reliefs as the Court may deem fit and just to grant.

The facts leading to this application as extracted from the CMA record, applicant's affidavit, and the Respondent's counter affidavit are as hereunder explained. The Respondents were employed by the Applicant as Loaders. On 30th November 2019 they were retrenched for what the Applicant claimed to be the reason of structural needs in business operations. Being dissatisfied with the retrenchment, the respondents referred the matter to the CMA. Having found the retrenchment to be unfair in terms of procedure and reason, the CMA awarded the instant respondents 12 months remuneration as compensation to each. The award aggrieved the Applicant who decided to lodge this application.

Along with the Chamber summons, in support of the application, the affidavit of the applicant was filed, in which after elucidating the chronological events leading to this application, the applicant claimed that the Respondents were fairly retrenched. The Applicant challenged the arbitrator's decision for awarding compensation of 12

months remuneration while the respondents were lawfully terminated in the retrenchment exercise lawfully performed.

In the applicants Affidavit, 5 grounds of revision have been raised to wit:-

> *"3.4.1 That, Arbitrator grossly misdirected herself by not appreciating the fact that, After serving the Respondents with the employers' Notice of intention to retrench, through their Regional Secretary of CHAWAMATA, (Exhibit D1), as the only recognized trade Union, the same which was also sent to the Branch of the CHAWAMATA at the place of work, and availed on the Notice Boards of the Applicants work premises, and t there was no full by holding the first and second consultation meetings, in terms of (Exhibits D2 and D3) being minutes of the said consultation meetings, which were concluded by the signing the Retrenchment Agreement thereof, (Exhibit D4) with the said employees representatives, then the Respondent did comply with the statutory procedural requirement to effect the retrenchment.*
>
> *3.4.2 That, Honorable arbitrator grossly erred in law and facts by holding that the Applicant failed to prove that there were*

valid reasons for retrenchment, because the Respondent failed to tender evidence to establish that it had financial constraints that warranted the Applicant company to change its structural set up.

3.4.3 That, the Honorable arbitrator grossly erred in law and facts by holding that economic reasons in the business is the ground for having structural changes that lead to retrenchment of employees.

3.4.4 That, the Honorable arbitrator grossly erred in law and facts by holding that in so far as the Applicant consulted the recognized trade Union CHAMAWATA prior to retrenchment, then the employees were not involved and consulted in the process leading to their retrenchment. Even the Respondents never denied being members of the said trade union.

3.4.5 That, the Honorable arbitrator grossly erred both in law and facts by granting compensation of twelve months salaries to confirm unfair termination while, Applicant had valid reasons and observed substantive procedure prior to retrenchment of the Respondents.

Along with the above grounds, the applicant advanced two legal issues of revision as stated at paragraph 4 of the affidavit as follows:-

i) In the course of retrenchment, upon having issued Notice of intention to retrench, and inviting the recognised trade union and its branch at the place of work, for consultation, whether it's yet the statutory duty of the employer to invite individual employees.

ii) Whether structural changes of the business as ground for retrenchment, ought to be proved by economic reasons to justify retrenchment.

The application was contested by the Respondents vide a joint counter affidavit which denied existence of any procedural compliance in the retrenchment exercise. The Respondents further disputed any existence of irregularities on the award of the CMA.

During hearing of this application the applicant was represented by Mr. Mwambene Adam, Advocate, whereas the Respondents were represented by Mr. Edward Ngatunga, Personal Representative. The hearing of the matter proceeded by a way of written submissions following the parties' prayer on 28th April 2022. I thank both parties for complying with the Court's schedule in filing the submissions. In

the submissions, the applicant consolidated and argued ground No. 1 and 4 together while ground No. 2 was consolidated with ground No. 3.

With regards to the 1st and the 4th ground in consolidation concerning the validity of consultation prior to retrenchment, Mr. Mwambene contended the Applicant complied with **Section 38 (1) (d) (i) of the Employment and Labour Relations Act, No. 4 of 2004, Cap 366 of 2019 R.E** which requires consultation to be done with a recognized trade union prior to retrenchment. He stated that the applicants' place of work has only one Registered and Recognized Trade Union which is known as "CHAMAWATA". That the applicant issued notice of intention to retrench dated 19th November 2019, to the Trade Union Branch leadership and, with copies to CHAMAWATA Regional Secretary of Ilala and further copies to all the employees vide their department heads and notice boards of place of work, of the respective trade union at their place of work. He stated that having accomplished its part, the liability therefore remained with the registered trade union and the individual employees to deliver and access the availed information.

It is Mr. Mwambwene's view that, the Arbitrator grossly misconceived in her interpretation of the contents of **section 67 (1) of Cap 366 of 2019 R.E (supra)** by holding that the applicant ought to consult the individuals employees apart from the Trade Union. Section 67 emphasizes thus:-

> *"A registered trade union that represents the majority of the employees in an opportunity bargaining unit shall be entitled to be recognized as the exclusive bargaining agents of the employees in that unit".*

Mr. Mwambene stated that "CHAMAWATA" being registered and recognized by the applicant, then the Arbitrator could not have ignored the applicant's information channeled through it.

Regarding notice of intention to retrench, Mr. Mwambene submitted that he is surprised with the Arbitrator's view that there was no disclosure of material information while he found that the notice of intention to retrench was duly served. He referred to Exhibits D2 and D3 which were the subject matter for discussion in the said consultation meetings.

In support of his submission, the counsel for the Applicant cited the cases of **Rashidi Benjamin and 6 Others Vs. Transcargo Ltd.**,

Rev. No. 59 of 2011, reported as Case No. 92 in the Labour Case Court Digest of 2011-2012, and **Singita Grument Reserves Ltd. Vs. Pius Edward Burito,** Revision No. 31 of 2021 at Musoma reported as Case No. 148 in LCCD of 2013.

Regarding ground 2 and 3, Mr. Mwambene argued that the Arbitrator misdirected himself to conclude and hold that the applicant failed to prove that there were valid reasons for retrenchment since no prove of financial constraints or economic hardship to warrant changes in the Applicant's structural set up. In Mwambene's view, structural reasons do not necessarily depend on economic reason when an employer wants to retrench.

On ground 5 regarding reliefs, Mr. Mwambene challenged arbitrators' award of compensation of 12 months remuneration while there were valid reasons of retrenchment coupled with appropriate procedure.

He alerted that an Arbitrator, or the Labour Court ought to have established that the termination was unfair contrary to **Section 37 of Cap 366 R.E 2019** for compensation of 12 months to be awarded in terms of section 40 (1) (c) of **Cap 366 R.E 2019** (supra). In his view, in this matter, the arbitrator having agreed with the fact that notice of intention to retrench was duly served; that two

consultations meetings were held; that retrenchment agreement was arrived at amongst the parties with all terminal benefits paid to the employees and a certificate of service issued, therefore this Court has to find that there was valid reason for retrenchment and that fair procedure was followed.

In reply regarding to grounds No. 2 and No. 3 in consolidation, Mr. Ngatunga submitted that there was no prove on how the Applicant's structural changes were suffice to terminate the contract of the respondents. He cited the case of **Leza Ally Mnukwa v. Mtibwa Sugar Estates Ltd.**, Rev. No. 339 of 2013 (unreported) the Labour Division of the High Court (Hon. S.A.N. Wambura, J.) which referred to a South African case of **South Africa between National Union of Metal Workers of South Africa and Atlantic Diesel Engines (Pty) Limited [1993] 24 ILJ 642 (LAC)**. Basing on this authority Mr. Ngatunga submitted that, termination was not the only option as no explanation given by the applicant to indicate if the respondents were no longer needed in the new structure.

Mr. Ngatunga submitted further that it is undoubtedly clear that the reason for the retrenchment was not well established and the failure to observe this, renders the respondents' termination to be unfair. He

supported this assertion by the case of **KMM (2006) Entrepreneurs Ltd. Vs. Emmanuel Kimetule,** Lab. Div. SBWG, Labour Revision No. 19 of 2014. He asserted that in our instant dispute the applicant has failed to prove that operational requirement was a genuine reason to justify the termination but rather a mere pretext. In such circumstances he is of the view that the applicant failed to prove the existence of fair reason for terminating the respondents by not justifying the reason to the required standard.

On the 1st and 4th ground, Mr. Ngatunga submitted that in implementing retrenchment exercise the employer should follow the requisite procedures as prescribed under the provisions of **Section 38 (1) (a) (b) (c) and (d) (iii) of the Employment and Labour Relations Act, 2004** read together with **Rules 13-26 of The Employment and Labour Relations (Code of Good Practice) Rules (GN. No. 42 of 2007)**. He stated that the Rules direct employer to disclose to the consulting parties all the relevant information concerning the intended retrenchment to enable a meaningful consultation to take place on a range of issues such as reason for intended retrenchment, any measuring to avoid the intended retrenchment, the selection of employees to be retrenched,

the timing, and severance pay in respect of the intended retrenchment.

Mr. Ngatunga further submitted that no witness was called to testify whether in anyway the respondents were involved in the retrenchment process and this tainted the fairness of the termination. He is of the view that there was no real consultation on the ground since the trade union members didn't come to testify whether the respondents were involved in the retrenchment process or not. In bolstering his position, he cited the case of **Security Group (T) Ltd. Vs. Samson Yakobo and 10 Others,** Civil Appeal No. 76 of 2016. He is of the view that consultation of the trade union without a prove of employees involvement renders the consultation to have dot been done. He thus prayed for the application to be dismissed.

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

In approaching the above issue, the grounds identified in the affidavit will be considered in a sequential order as presented in the parties'

submissions. I would point out that it is known that fairness is evaluated in two aspects which are reasons and procedures. The 2nd and the 3rd grounds which will be addressed first, concern the fairness of retrenchment reason. The center of parties' debate in these grounds concentrates on whether to become a ground for retrenchment, structural changes of the business ought to have been proved by economic reasons.

In the CMA, the arbitrator found that there was no valid reason for termination as the applicant failed to prove that the alleged structural changes were backed by economic reasons which could not enable the retrenched employees to be accommodated and absorbed in the new structure. The applicant is of the view that structural adjustments alone can constitute a reasonable cause for retrenchment without demonstrating any economic ground.

Section 37 of the Employment and Labour Relations Act, 2004 provides that it is unlawful for the employer to terminate the employment of an employee unfairly. The section imposes on the employer a duty to prove that the reason for any termination was fair

to the employee. Section 37 (1) and (2) reads as follows:-

> ***"37 (1) It shall be unlawful for an employee to terminate the employment of an employee unfairly.***
>
> ***(2) A termination of employment by an employer is unfair if the employer fails to prove:-***
>
> ***(a) That the reasons for termination is valid;***
>
> ***(b) That the reason is a fair reason:-***
>
> ***(i)Related to the employee's conduct, capacity or compatibility; or***
>
> ***(ii) Based on the operational requirements of the employer, and***
>
> ***(c) That the employment was terminated in accordance with a fair procedure."***

The above provision makes unfair termination to be unlawful unless the employer (applicant) proves the validity and fairness in both reason and procedure. Was there a fair reason for the retrenchment in this matter?

The letter of termination states that the reason for retrenchment was structural changes. **(See Exhibit D-5 (letter of termination).** The letter states further that it was inevitable for retrenchment to be

exercised due to business changes as per **Exhibit D-2 (Minutes of retrenchment Meeting)**. Whether this structural changes alone can amount to good reason, I have been persuaded by the decisions in **Bakari Athumani Mtandika V. Superdoll trailer Ltd. Labour Revision No. 171 of 2013 (Unreported)**; and **Security Group (T) Ltd. Vs. Samson Yakobo and 10 Others,** Civil Appeal No. 76 of 2016 **(Unreported),** (both cited by the Respondent). In **Bakari versus Superdoll,** it was explained that the basic duty of decision maker in unfair termination dispute where operational reasons are raised as a cause for terminating an employee, among those duties are to inquire whether or not operational grounds were genuine reason justifying termination or a pretext.

In the instant matter it is undisputed that there was a change in applicant's business which necessitated the structural changes. What constitute operational requirement is defined by **Section 4 of CAP 366 RE 2019 as**:-

> *"Operational requirements" means requirements based on the economic, technological, structural or similar needs of the employer".*

From the above definition, operational requirement can be based on structural needs as the case in this matter. From my interpretation of the above definition, structural needs alone can result into operational requirement which may necessitate retrenchment. I do not agree with the arbitrator that both economic and structural needs must co exists to constitute reason of operational requirement in retrenchment. I agree with the Applicant's counsel that structural reasons constitute an independent ground to justify retrenchment so long as explanation is given as to its importance.

As to whether there was fairness in those structural changes, the arbitrator found unfairness on the reason that the employer ought to have transferred the respondent's employment into the company which took over their works. I have read the minutes of retrenchment meeting **(Exhibit D2)** and noted that among the reasons given for that exercise was to sell and rent the Applicant's trucks which went together with closing some of the service garages and minimization of cross border transportation including transfer of the transportation activities to Applicant's subsidiary Company and another company named Maisha Tanzania Limited. This assertion was confirmed by DW1. In my view, the Applicant had a right to exercise these

structural changes and if there were employees who remained redundant, then retrenchment was a necessary option. I differ with the arbitrator's holding that there was no fair reason to retrench the Respondents. On such basis I am of the view that there was a valid and fair reason for termination. Therefore, the respondents' allegation that the Applicant failed to prove reason for termination lacks merits.

As the termination was exercised by way of retrenchment and that the reason was valid, the next question on the first ground of revision is whether the procedure for retrenchment was adhered to by the employer. This will cover grounds 1 and 4.

The ELRA in section 38 provides for mandatory procedures to be followed during termination based on retrenchment. Section 38 (1) reads as follows:-

> ***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; and

(v) severance pay in respect of the retrenchments.

d) give the notice, make the disclosure and consult, 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 represented by a recognized trade union;

(iii) any employees not represented by a recognized or registered trade union."

From the above provision, the employer is required to comply with 5 principles during retrenchment process. These grounds are notice of intention to retrench, disclosure of all relevant information on the intended retrenchment, consultation prior to retrenchment and issuance of notice for retrenchment. In addressing this issue, the respondents contended that there was no full consultation as the employees were not involved. It is only the issue of employees consultation which is contested in this matter. I could not see any dispute regarding the others.

It is not disputed that there were consultations between the Applicant and the Respondent's trade union namely CHAMAWATA regarding the retrenchment. What is in contest is that respondents do not agree with the Applicant that consultation with the trade union without the applicants personally constitute full consultation. What I construe from **Section 38 (1) (d), of Cap 366 of 2019 RE**, consultation can be done to a registered or recognized trade union or an employee who is not represented by a recognized trade union.

It is asserted by the applicant's counsel that since CHAMAWATA was the only trade union being registered at the workplace for representing the employees, nothing was wrong in involving it on

behalf of the respondents. This existence of the trade union is not disputed by the Respondents. The Respondents' contention lies on the appropriateness of having only the trade union consulted without their personal involvement.

From Section 38 (1) (d) (i) to (iii), it is very clear that consultation needs to be done to a registered and recognized trade union or the employees who are not the members of such kind of a Trade union. The respondents never disputed being a member of Trade Union CHAMAWATA at their working place. In line with **Section 38 (1) (d), of Cap 366 of 2019 R.E**, I am of the view that nothing was wrong for the applicant to discuss and agree with the CHAMWATA on behalf of employees. Being members of the trade union, there is a presumption that the Respondents consented to bestow exclusive bargaining power to that Trade Union. I could not see the legal back up which formed the basis of the arbitrator's findings that consultation to the trade union is not sufficient. In this respect, I am inclined to differ with the arbitrator.

Since by the evidence of DW1 at page 9 the applicant issued notice of retrenchment as per Exhibit D-1; held two consultation meetings with the recognized trade union as per Exhibit D-2 and D-3 (Minutes of

consultation meeting); paid to the respondents retrenchment package and certificate of services as per Exhibit D-8 and D-9, I have view that there was reasonable compliance to the procedure which can confirm that the respondents' termination was procedurally fair.

Having found both the reason and procedure for termination to be fair, I answer the framed issue thus, the applicant has established sufficient grounds to warrant the revision of the decision of the CMA.

From the above finding, I hereby revise the CMA proceedings and decision in Labour Dispute No. CMA/DSM/ILA/110/19/45/2020, quash the proceedings and set aside the award therein. The application is therefore allowed. Each party to take care of its own cost. It is so ordered.

Dated at Dar es Salaam this 26th day of July, 2022.

KATARINA REVOCATI MTEULE

JUDGE

26/07/2022