IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO. 258 OF 2021

ANYELWISYE M. MELELE.....1ST APPLICANT

FARIDA SALEHE.....2ND APPLICANT

AMIRI MWEMBE.....3RD APPLICANT

ADAM ALEKO.....4TH APPLICANT

SAIDI BALOZI.....5TH APPLICANT

KWEGE RUTENGWE.....6TH APPLICANT

SIMON MARISHAM.....7TH APPLICANT

GWENDOLYN KIRENGA.....8TH APPLICANT

AGNESS MSIGALA.....9TH APPLICANT

RASHIDI MAMBOLEO.....10TH APPLICANT

ECKLAND CHAMUNGWANA.....11TH APPLICANT

NTEZE PATRIC.....12TH APPLICANT

SAMORA KATANO.....13TH APPLICANT

ABDALLAH MACHONGWE.....14TH APPLICANT

RAMADHANI MAJESHI.....15TH APPLICANT

RICHARD MOHAMED.....16TH APPLICANT

SALIM MACCA ..... 17TH APPLICANT

HASHIM SEKIZIO.....18TH APPLICANT

SOPHIA MOBUTU.....19TH APPLICANT

CARTAS HAULE.....20TH APPLICANT

MARGRETH URONU.....21ST APPLICANT

MATHIAS KAZULLA..... 22ND APPLICANT

HERIETH KIMARO.....23RD APPLICANT

ZUWENA MARUNGU.....24TH APPLICANT

BASILISA MUNISI.....25TH APPLICANT

CONSOLATA SITTA.....26TH APPLICANT

SEIF MUHENGA.....27TH APPLICANT

JAMILA IBRAHIMU.....28TH APPLICANT

ERICA MATWAGA.....29TH APPLICANT

NEEMA SWAI.....30TH APPLICANT

PHILIP ZAKHARIA.....31ST APPLICANT

RADHIA MGOMBA.....32ND APPLICANT

DEOGRATIUS MABOMBO.....33RD APPLICANT

ELLY MNDOLWA.....34TH APPLICANT

REGINALD LAIZER.....35TH APPLICANT

LAWRENCE MWAIPYANA.....36TH APPLICANT

SABINA MMARI.....37TH APPLICANT

JULIUS MOHAMED.....38TH APPLICANT

FRANK GERALD.....39TH APPLICANT

LEVIS KIWANGA.....40TH APPLICANT

BAPTIST KOMBA.....41ST APPLICANT

NASTASIU FAUSTINE.....42ND APPLICANT

HELMINA NGOSYA.....43RD APPLICANT

CATHERINE BOSCO.....44TH APPLICANT

VERSUS

SOUTHERN SUN HOTEL LTD ..... 1st RESPONDENT

AZAMZAM SADICK NKYA.....2ND RESPONDENT

GILBERT FABIAN MAX..... 3RD RESPONDENT

VENANCE THOMAS KANTWANA.....4TH RESPONDENT

PASCAL EMMANUEL LONGINO.....5TH RESPONDENT

PHILIP CHARLES NYONGOTO.....6TH RESPONDENT

RAMADHANI KHAMIS MKUBILI.....7TH RESPONDENT

ZAWADI CHARLES MUTA.....8TH RESPONDENT

MERCY AUGUSTINE KIWIA.....9TH RESPONDENT

DILIFONCE VEDASTO MTEMI.....10TH RESPONDENT

JOHARI ALMASI MASANGULA .....11TH RESPONDENT

DAVID JOSEPH KAAFRICA.....12TH RESPONDENT

SAMWEL UKINGE.....13TH RESPONDENT

RAMADHANI MKUBIRI.....14TH RESPONDENT

PHILIP NYONGOFU.....15TH RESPONDENT

CLARA NDOSSI.....16TH RESPONDENT

AZIZA HILARI.....17TH RESPONDENT

ANTONIA LYANKURU.....18TH RESPONDENT

DAVID YATERA.....19TH RESPONDENT

DAVID JOSEPH.....20TH RESPONDENT

JEREMIAH LIGWE.....21ST RESPONDENT

DILFONCE VEDASTUS.....22ND RESPONDENT

IBRAHIM LIGWE.....23RD RESPONDENT

LUTAMBUKA NEMILIAN.....24TH RESPONDENT

WINIFRIDA NGUNGILA.....25TH RESPONDENT

REMINUS NGUNGILA.....26TH RESPONDENT

COROLINE SEREKA.....27TH RESPONDENT

EMANUEL SAIMON.....28TH RESPONDENT

MAGNUS KAMTAWA.....29TH RESPONDENT

LILIAN KAUNDA..... 30TH RESPONDENT

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

(Kiangi, Arbitrator)

Dated 28th May 2021

in

REF: CMA/DSM/ILA/673/20/289

JUDGEMENT

27th April & 4th August 2022

Rwizile J

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/ILA/673/20/289. This Court has been asked to revise and set aside the award of the CMA.

In brief, it has been stated that the applicants were employed by the 1st respondent and were paid on monthly basis. Contrary to their employment contract, on 27th April, 2020, following Covid-19 pandemic, the applicants received a salary cut of 80% each from their basic salary and were ordered to work from home. The applicants were not happy with the salary cuts without prior information. They therefore filed a labour dispute

against the respondents at CMA. The award was in favour of the respondents. The applicants were aggrieved, hence this application.

The application is supported by the applicants' joint affidavit but opposed by the respondent's counter affidavit sworn by James Mwenda, the respondent's Advocate. There was only one ground for revision which stated:

> *Whether the applicants have demonstrated a sound and sufficient cause and reason for this Court to exercise its revision powers.*

Unfortunately, the applicants failed to serve other respondents except the first respondent in spite of being given reasonable time to do so. This court therefore struck off the case of the 2nd to 30th respondents and ordered the case to proceed against the 1st respondent only.

Hearing was by way of written submissions. The applicants were represented by Mr. James Mwenda, learned Advocate whereas the 1st respondent enjoyed services of Mr. Waziri Mchome, learned Advocate.

Mr. Mwenda submitted that the decision of the CMA was unlawful, illogical and improperly procured and was contrary to Article 23(1) and (2) of the Constitution of the United Republic of Tanzania, 1977 which provides for entitlements of remuneration to every person for work done. He stated

that the 1st respondent's allegation that she consulted the applicants about the salary deduction has not been proved and it is against the principle of law which requires the one who alleges must prove as held in the case of **Geita Gold Mining Ltd v Ignas Athanas**, Civil Appeal No. 227 of 2017 (unreported).

The law provides, the learned counsel argued, consultation must be done before salary deductions can be effected to the employee as under sections 28(1)(a) and 15(1)(h) and (4) of the Employment and Labour Relation Act [CAP. 366 R.E. 2019]. In his view, the conduct of the respondent is against the principal of sanctity of contract, as held in the case of **Simon Kichele Chacha v Aveline M. Kilawe**, Civil Appeal No. 160 of 2018 (unreported). But as well, he argued, the employer's conduct amounted to serious breach of contract, which deserves compensation as provided by section 73(1) of the Law of Contract Act [CAP. 345 R.E. 2019].

In fine, he asked this Court to revise and set aside the decision of the CMA because it was neither fair nor just on the applicant's side, they deserve payment of 80% of their unpaid remuneration.

To reply, Mr. Mchome submitted that there was no agreement between the parties. He said, the applicants did not prove so at the CMA, because there is no documentary evidence of the existence of the contract

between the parties. The learned counsel fetched support in section 65(1)(a) to (e) 100 of the Evidence Act, as also decided by this court in the case of **Justine Urono v Foremost System Limited**, Revision No. 824 of 2019, High Court of Tanzania (unreported).

He continued to submit that the first respondent and the applicants had consultation and came to an agreement to suspend operations. What was not agreed, is the amount of salary to be paid among all employees. He stated that the CMA findings based on the evidence given and supported by the facts of the case.

The law, he made it clear, it casts the duty to make consultation in good faith to both the employer and employees. To support his point, he cited the case of **Tanzania Building Works Limited v Ally Mgomba & 4 Others**, Revision No. 305 of 2010, High Court of Tanzania (Labour Division) at Dar es Salaam (unreported).

It was submitted further that the applicants refused to sign payment of 20% of the salaries to be paid during the suspension of operations. Payment of 20%, the learned counsel added, was also done to employees of the parent company in South Africa. To him, this was paid for utilities. He then stated that in December, 2020 the applicants were paid extra gratia amount equal to 40% of the employee's salary, and that on 31st

March, 2021 some employees accepted voluntary retirement and for the rest their employment was terminated.

He submitted, it was not possible to continue working during the period of COVID-19. He then stated that what has been averred in the counter affidavit was not disputed by the applicants through the reply and it was therefore admitted. He supported his submission by the case of **East African Cables (T) Limited v Spencon Services Ltd**, Miscellaneous Commercial Application No. 61 of 2016, High Court of Tanzania (Commercial Division) at Dar es Salaam (unreported) at page 7. The learned counsel further said, that there was no breach of contract because non-performance of the contracts of employment by both parties was contributed by factors not within the control of either party. To support his submission, he cited the case of **Post Office Retirement Fund v The South African Post Office SOC Ltd & Others**, No. 35043/2020, High Court of South African (Gauteng Division) at page 16 (paragraph 64).

He submitted that Article 23(1) and (2) of the Constitution (supra) only applies to employees working. The applicants, he added, were not working during that time. He supported that position as in the book by Janice Cairns ***"Employment Law for the Business Student, 2nd***

Edition, 2004 at page 205," and the case of **Ndarry Construction v Ilala Municipal Council**, Commercial Case No. 31 of 2015, High Court of Tanzania (Commercial Division) at Dar es Salaam (unreported) at page 16. Finally, the learned counsel held the view, this application be dismissed for being devoid of merit.

In re-joining, Mr. Mwenda submitted that the case of **Justine Uroso v Foremost System Limited** (supra) is too remote from the facts of this matter. Further, he argued, the case of **Tanzania Building Works Limited v Ally Mgomba & 4 Others** (supra) is distinguishable as it was specific on retrenchment. He submitted further that, the economic hardship cannot constitute force majeure or frustration which renders the impossibility of performance of the contract as held in the case of **M/S Kanyarwe Building Contractors v Attorney General and Another** T.L.R (1985) at page 161. The learned counsel reiterated the submission in chief.

After going through the submissions and CMA records, this court is required, I think to determine, *if there was an employment contract between the parties. And if so, were the terms breached?*

The dispute is that the applicants had no proof of employment. But I think I have to say, that at law, all agreements are contracts, if they are made

by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void as provided for under section 10 of the Law of Contract Act [CAP. 345 R.E. 2019]

Going by evidence before the CMA, it was the evidence of Dw1, that despite having no documentary proof of the existence of the contract with the 1st respondent, he was of the evidence that, he knew applicants as the 1st respondent's employees. The extract from his evidence clearly puts it that way (untyped proceeding):

> *"S/J – Unawatambua walalamikaji walikuwa ni wafanyakazi wa Southern Sun Hotel Ltd?*
>
> - *Ndio, niliwatambua waliofika mbele yako Mheshimiwa*
>
> *S/J – Walalamikaji walikuwa na mikataba ya aina gani?*
>
> - *Ya kudumu, ila ina masharti, inaeleza hata hali ya uzalishaji ikibadilika maamuzi ya aina fulani yanaweza kuchukuliwa."*

It is clear to me, Dw1 working in the position of controlling finances, knew the applicants as they appeared before the CMA. It means, there was a contract establishing employment relationship between the two parties. The applicants therefore were employees of the 1st respondent.

Indeed, there is no dispute that 80% of the applicants' salary was cut due to COVID-19. There is no evidence that the salary cut was a product of common understanding. In actual fact, there was no consultation and to the applicants the decision came by surprise. Both parties are not in dispute of this fact. Basing on the evidence of Dw1, the 1st respondent alone decided to deduct the salaries of the applicants by 80% as it is shown hereunder; (in the untyped): -

"S/J – Kabla ya kusitisha huduma, hatua gani mlichukua?

- *Mnmo tarehe 25/3/2020 mwenyekiti wa bodi ya wakurugenzi ya Southern Suns Hotels (T) Ltd Ndg. Sam Mapende alikuja ofisini Southern Sun akaniita na kuniambia bodi ya wakurugenzi imeazimia kusitisha uzalishaji kutokana na mlipuko na janga la Corona ... na baada ya kumueleza Tom Koboga hayo aliomba uitishwe mkutano wa wafanyakazi wote ili pia kuwaelezea azimio la bodi la wakurugenzi kusitisha uzalishaji ... na kiwango cha mshahara... alieleza kuwa kiwango watakacholipwa wafanyakazi katika kipindi cha mlipuko wa Corona ni 20% ya mshahara...*
    - *S/J – Baada ya hayo maelezo, wafanyakazi baada ya kuelezwa hayo walirespond vipi?*

- *Baada ya wafanyakazi kuelezwa hayo, wapo walioitikia na kusaini barua hizo na wapo wengine waliokataa na kuleta malalamiko yao Tume"*

From the evidence as above, it is clear to me that what is at variance between parties is a reason for the deduction as financial constrains and COVID-19. A glance in the evidence of Dw1 again provides the answer, (unreported).

"S/J – Hata kabla ya Corona hali ya Co. ilishakuwa mbaya?

- *Hilo ni kweli, hali ya Co. ilishakuwa mbaya, hata mashahidi walilithibitisha...*

S/J – Ni kipi hasa kilipelekea Co. kuwalipa 20% ya mishahara aidha ni Corona au Co. kuyumba kiuchumi?

- *Nilieleza kuwa Corona imechangia kushuka kwa uchumi, sio tu Tanzania bali ni dunia nzima, watu wasipofika sisi tunakosa mapato"*

This testimony shows that the respondent's reason to deduct the applicant's salaries by 80% started before COVID-19 but were ignited by it.

By this testimony it proves that the 1st respondent decided by herself on the amount to be deducted from the applicant's salaries without any consultation, they were only informed in the meeting of the decision taken. I think, employees were entitled to be heard on the matter before the decision was forced on to them. In the case of **Univeler Tanzania Ltd v Benedict Mkasa Bema Entreprises**, Civil Application No. 41 of 2009, Court of Appeal as cited in the case of **Higher Education Student's Loan Board v George Nyatega**, Labour Revision No. 846 of 2018 High Court at Dar es Salaam at page 5 it was held: -

> *"It was stated that the parties are bound by the agreements they freely entered into. No party would therefore be permitted to go outside that agreement for remedy."*

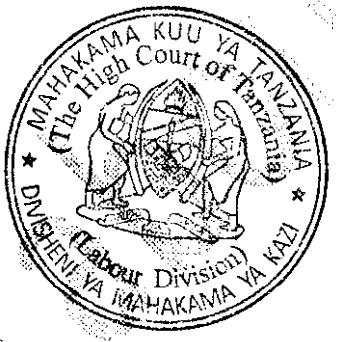
It is a trite law that parties are bound by their agreement. This means in any situation (be it financial constraints, COVID-19 or both) the 1st respondent had to consult the applicants, discuss the situation and then come to new terms precipitated by the current situation. In doing so, laws and procedure would have been complied with.

Dw1 testified that, the contract with the applicant had a reduction clause that when production falls, some decision should be made by the respondent. Given the circumstances, it was the duty of the respondent

to prove that such terms existed as the law provides. Above all, there was no contract tendered to show the terms.

From the foregoing, there is no justification in my view, to have the applicants' salary cut by 80%.

Dealing with the last issue, as the CMA record shows, each of the applicants had own salary. The deduction from their salary started from April to November, 2021 which is 8 months in total. For that matter, all applicants had salary cuts for that period without justification. The same should be paid their 80% as from April, 2021 to November, 2021. This application therefore has merit. The CMA award is hereby quashed and set aside. Since this is the labour matter, I order no costs to either party.



A.K. Rwizile

JUDGE

05.08.2022