IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 402 OF 2020

(From the decision of the Commission for Mediation and Arbitration of DSM at Ilala) (Kiangi: Arbitrator) dated 11th September 2020 in Labour Dispute No. CMA/DSM/ILA/84/2019)

BETWEEN

DEL MONTE (T) LIMITED.....APPLICANT

VERSUS

EMMANUEL DAVID MWAISANILA.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

3rd August 2022 & 10th August 2022

Aggrieved with the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] the applicant has filed this application under Sections 91 (l) (a) (b), (2) (a) (b) (c), (4) (a) (b) and 94 (l) (b) (i) of the Employment and Labour Relations Act No. 6 [CAP 366 RE 2019]; Rules 24 (1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) and 28 (l) (c) (d) and (2) of the Labour Court Rules, GN. No. 106 of 2017 and any other enabling provisions of the law, praying for the following Orders:-

1. That this Honorable Court be pleased to call and revise the Arbitration proceedings in Labour Dispute No. CMA/DSM/ILA/84/2019 between Emmanuel David Mwaisanila

and Del Monte (T) Limited by the Commission for Mediation and Arbitration at Dar es Salaam Zone-Ilala.

2. That this Honourable Court be pleased to quash and set aside the arbitration Award in Labour Dispute No. CMA/DSM/ILA/84/2019 between Emmanuel David Mwaisanila and Del Monte (T) Limited by the Commission for Mediation and Arbitration at Dar es salaam Zone-Ilala as the same is tainted with material irregularities, illegalities and the decision was improperly procured.
3. That the Honourable Court be pleased to grant any other order that it consider just and convenient to grant.

At this point I offer a brief sequence of facts leading to this application as extracted from CMA record, applicant's affidavit and the respondent's affidavit and parties' submissions. The Respondent was employed by the Applicant as a truck driver. On 10th January 2019 the Respondent was retrenched for the reason of financial constraints in business operations. Being dissatisfied with the employer's decision, on 30th January 2019 the Respondent referred the matter to the CMA where he was awarded 12 months remuneration as compensation after the CMA have found both

reasons and procedure for retrenchment to be unfair. The applicant was not satisfied with the award hence this application.

Along with the Chamber summons, the Applicant filed an affidavit in which after elucidating the chronological events leading to this application, alleged that the arbitrator erred in law by awarding compensation of 12 months while respondents were lawfully terminated in a retrenchment exercise.

The applicants advanced seven legal issues of revision as stated at paragraph 24 of the affidavit as follows:-

a) Whether it was proper for the arbitrator to hold that the reason of termination was not for lack of document to support the same while disregarding oral evidence adduced and exhibit tendered.

b) Whether the arbitrator wrongly ruled that there was no proof of consultation meeting while disregarding oral evidence adduced by the applicant's witness.

c) Whether it was proper for the arbitrator to issue decision out of time without giving justifiable reasons thereof and without any agreement to extend time by the parties.

d) Whether the arbitrator made proper analysis of the evidence adduced in relation to the justification of the reason for termination and holding of consultation meeting.

e) Whether it was proper for the arbitrator to hold that the termination of respondent employment did not follow any legal procedure without any legal justification.

f) Whether the arbitrator consider the guidelines set out by the law in awarding compensation to the respondent.

g) Whether it was proper for the arbitrator to hold on matters which were neither in question nor relates with the reason of termination.

In this application parties enjoyed legal services. The applicant was represented by Mr. Francis Walter Mchomvu, Advocate, whereas the Respondent was represented by Mr. Tesiel Augustino Kikoti, Advocate. The matter proceeded by a way of written submissions following the parties' prayer on 01st June 2022. I thank both parties for complying with the Court's schedule in filing the submissions.

Arguing in support of the application regarding reason Mr. Mchomvu submitted that the commission erred in law by ruling that the Applicant did not have a valid reason to terminate the respondent by

way of retrenchment basing on a view that the Applicant failed to prove economic hardship. He stated that the applicant was on financial difficulties due to closure of some construction projects bearing in mind that the nature of the work of the applicant depends mostly on existence of construction projects. According to Mr. Mchomvu the reason for termination was valid and fair and is recognized by law under **Section 38 of Cap 366 read together with Rule 23 (2) (a) of the Employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2007 (here in referred to as GN. No. 42 of 2007).**

It was further submitted by Mr. Mchomvu that due to financial difficulties, the applicant had no option but to reduce the number of workforces to meet her demands. In complying with the law, the applicant issued a notice of intention to retrench on 5th January 2020 to all employees including the respondent, which clearly indicate that the Applicant is under financial difficult therefore no way she could escape retrenchment. He added that since the notice was tendered and admitted as Exhibit D2 which became part of the record, therefore Commission ought to use the same in issuing the award.

Mr. Mchomvu submitted that during cross examination the respondent admitted that a notice stating the reason for retrenchment was issued as recorded at page 32 and 33 of the commission proceedings. He averred that the respondent was aware of the reason for his termination and that he admitted having been told by the applicant the reason for retrenchment at paragraph 4 of his counter affidavit in reply to the revision application. Mr. Mchomvu is of the view that a counter affidavit being a substitute of oral evidence, under oath carries weigh as admissible evidence and should be treated as such. On that basis he believes that the reason for termination was valid and fair. Supporting his submission, he cited the case of **Japan International Cooperation Agency (JICA) vs. Khaki Complex Limited**, Civil Appeal No. 107 of 2004, Court of Appeal of Tanzania, at Dar es Salaam, (Unreported).

On procedural aspect Mr. Mchomvu submitted that for the retrenchment to be procedurally fair, the Applicant must give notice of intention to retrench, disclose relevant information and consult with the Respondent, as it was held in the case of **Resolution Insurance Ltd. vs. Emmanuel Shio & others**, Labour Revision No. 642 of 2019 (unreported). He stated that the applicant notified the respondent about her intention to reduce the number of

employees due to economic hardship and the completion of construction projects and that the said notice provided all relevant information on reason for retrenchment to all employees who might have been affected with the exercise including the respondent. According to Mr. Mchomvu, this was testified by DW2 at page 15, 18, 20, 21 and 22 of the proceedings as well as on cross examination of the respondent where he testified to have received the notice which shows the reason for retrenchment as per page 32 of the CMA proceedings. In his view, **section 143 of the Evidence Act [CP 6 R.E 2019]** is to the effect that number of witnesses is immaterial to prove a fact rather a document tendered under evidence form part of the record. In such circumstances Mr. Mchomvu is of the view that the applicant satisfied on the issue of notification about the intention to retrench its employees including the respondent, thus complied with **section 38 (1) (a) of Cap 366 R.E 2019**.

On the issue of consultation, Mr. Mchomvu submitted that it was wrong for the honorable Arbitrator to hold that there was no consultation conducted by the applicant during retrenchment process. He stated that they honestly admit that the applicant did not record minutes of the consultation meeting, but that does not mean she did not consult the respondent regarding the exercise.

Mr. Mchomvu recalled the applicant's director's visit to the construction site on 4/1/2019 where he informed the respondent to come to the applicant's office on 5/1/2019 where a notice of retrenchment was issued to inform him to attend consultation on 7/1/2019. He stated further that the respondent was informed about the outcome of the consultation meeting on 10/1/2019. According to Mr. Mchomvu, the respondent's testimonies connect or interlink with that of the applicant which is sufficient enough for the Commission to realize that the applicant had consulted the respondent and on the same reason, the respondent accepted the terminal benefits after mutual consensus of retrenchment.

Mr. Mchomvu challenged the Respondent's silence from 10/1/2019 when notice of termination was issued to 28/1/2019 when the respondent received his retrenchment benefits in view that if the respondent was not satisfied with the benefits agreed on termination, he would have approached the Commission for mediation as required under section 38(2) of cap 366 before payment. He interpreted this silence as an agreement to the retrenchment.

Lastly Mr. Mchomvu called an afterthought the Respondents allegation that his termination resulted from failure to send a report

to the employer. He stated that such allegation was never pleaded in the CMA Form No.1 or in his Opening Statement. Disputing the allegation, he reminded this Court to observe the principles stated in the case of **Barclays bank (T) Ltd. vs. Jacob Muro,** Civil Appeal No. 357 of 2019, Court of Appeal of Tanzania, at Mbeya, (unreported).

On relief the Mr. Mchomvu argued that as the retrenchment exercise was fairly exercised then the respondent did not deserve compensation for unfair termination whatsoever.

Disputing the application on reason for termination Mr. Kikoti refuted any proof of economic hardship and closure of construction projects. He contends that nowhere the applicant had proved the existence of alleged economic hardship and closure of the said project in her evidence before the Commission. He cited the case of **Mustafa M. Mrope & Another v. Ultimate Security (T) Limited,** Revision No. 875 of 2019, High Court of Tanzania, Labour Division, at Dar es Salaam to bolster his argument. He averred that lack of this evidence to prove the alleged facts suggest that the applicant's reasons for retrenchment was not valid, and it is contrary to the principle that the one who allege must proof as was discussed in the case of **Abdul-**

Kalim Haji v. Raymond Nchimbi Alois and Joseph Sita Joseph [2006] TLR 420.

On second issue relating to procedure for retrenchment Mr. Kikoti submitted that for the retrenchment to be valid and fair one the applicant herein had to comply with the laid down procedures provided under **Section 38 (1) Cap 366 R. E 2019**. He stated that the applicant failed to observe the law before retrenchment which under **Section 38 (1) (d)** directs disclosure to trade union, to a registered trade union and to employees not in trade union. According to Mr. Kikoti, the evidence on record suggests that she held no such consultation meeting with the employees, as no attendance of the participants of the said meeting, minutes and even a member from any recognized trade union was consulted as required by the said provision of the law which is an indication that there was no consultation prior retrenchment. He cited the case of **Freight In Time Limited & Sunfresh Limited in time (t) Limited v. Rahabu Njeri Wangai,** Revision Application No. 92/2018, High Court of Tanzania, Labour Division, when quoting in approval the case of **KMM (2006) Entrepreneurs Ltd. vs. Emmanuel Kimetule,** Labour Revision No. 19 of 2014 where this position was confirmed.

Mr. Kikoti averred that since there is no evidence on record to suggest that there was a proper consultation made as per **section 38 of Cap 366 R.E 2019 and Rule 23, 24 of GN. No. 42 of 2007** he is of the view that retrenchment exercise was substantively and procedurally unfair. He challenged the relevance of the case of **Abas Kondo Gede v. Republic**, Criminal Appeal No. 472/2017 (unreported) cited by the applicant, arguing that the case is distinguishable because in this matter the applicant owe duty to prove the fairness of retrenchment exercise while in the cited case his oral evidence was worth and credit because it was given as a direct evidence given by a person who was present hence the court relied on that oral evidence, which is not the case in this matter.

Regarding relief (s) available to the parties Mr. Kikoti prayed for the application to be dismissed for want of merit for the reasons set forth as there is no proof of suffered economic hardship and loss of construction projects and the stipulated law and procedures was not followed.

The Applicant filed a rejoinder which will also be considered in determining this matter.

Guided by the submissions made by both parties, the applicant's affidavit, the Respondent counter affidavit and CMA record, I draw two issues for determination. The first one is **whether the applicant have provided sufficient ground for this Court to revise the CMA award** and the second one is **to what reliefs are parties entitled.**

In approaching the first issue, the grounds of revision identified in the affidavit will be considered. It is legally and practically well known that fairness in retrenchment exercise as one of the types of termination is evaluated in two aspects which are reasons and procedures.

In the CMA, the arbitrator found that there was no valid reason for termination as the applicant failed to prove on the alleged financial difficulties caused by closure of some construction project. Starting with the aspect of substantive fairness, the **Employment and Labour Relations Act, Cap 366 R.E 2019 under Section 37** provides that it is unlawful for the employer to terminate the employment of an employee unfairly. The provision imposes to the employer the duty to prove the fairness of the reasons for

termination. 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 letter of termination in this case states that the reason for termination was financial constraints resulted from project closure as justified by Exhibit D-3 (letter of termination).

From the parties' rival arguments, the first debate to resolve is whether the applicant was on financial difficulties which caused closure of some construction projects. I have visited the entire record of the matter and noted that the applicant neither explained how she

undergone financial difficulties nor mentioned the closed projects to justify the alleged financial constraints, for retrenchment to be exercised. Further to that no minutes of retrenchment meeting to explain whether the employees including the respondent were notified regarding the reason for retrenchment. In the case of **Bakari Athumani Mtandika V. Superdoll trailer Ltd.,** Labour Revision No. 171 of 2013 (Unreported) it was explained that the basic duty of a decision maker in unfair termination dispute where operational reasons have been raised, among the issues to be framed should be whether or not the operational grounds were genuine reason justifying termination or a pretext.

In the instant matter the applicant failed to prove which projects were closed contrary to **Section 39 of ELRA, Cap 366 R.E 2019** which place such duty to an employer while proving fairness of termination. On such basis I share view with the arbitrator that there was no valid and fair reason for termination. Therefore, the Respondents' argument that the Applicant failed to prove reason for termination has merits.

As the respondent was terminated by way of retrenchment and that the reason for termination was not valid, the next question is whether

the procedure for retrenchment was adhered to by the employer. Section 38 of the ELRA provides for mandatory procedures to be followed during termination based on retrenchment. It 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.

From the above provision, the employer is required to comply with 5 principles during retrenchment process, including notice of any intention to retrench, disclosure of all relevant information on the intended retrenchment, consultation prior to retrenchment and to give the notice for retrenchment. In addressing this issue, the respondent contends that there was no full consultation as there was no meeting conducted to employees including the respondent himself. The Respondent went further to state that the applicant failed even to tender the minutes of retrenchment meeting in justifying consultation.

On other hand the applicant maintained that there was a consultation as stated in the oral evidence of DW2. The Applicant is of the view that nothing was wrong on the part of the applicant as the respondent was called at the office of Director on different date and consulted regarding retrenchment.

Having gone through the record I noted that its undisputed that the notice of intention to retrench was issued as per Exhibit D2, however the applicant failed to tender attendance or minutes of retrenchment meeting to justify the consultation. Since its undisputed that retrenchment was done to all employees including respondent, there

was a serious need of tendering minutes of retrenchment meeting to show that how did they participate in the retrenchment exercise as per Section 38 of ELRA, Cap 366 R.E 2019 to ensure effective consultation. The absence of these minutes in the CMA, convinced the arbitrator to decide that such meetings were not held.

I agree with the respondent's Counsel that **Abas Kondo's Case (supra)** is not relevant in this application on the ground that in this application the applicant is placed on duty to prove that the termination was fair under both aspects. I do not see any reason to differ with the decision of the arbitrator in concluding that there was no effective consultation due to the absence of the minutes of staff meeting. In my view, the Applicant's allegation regarding retrenchment package and certificate of services does not justify illegal exercise in terminating the applicant's employment. Likewise, as the arbitrator did, I also find that there was no sufficient prove that there was a fair reason for the retrenchment of the Applicant's employees including the Respondent which was effected through an appropriate procedure.

In such circumstances I have no hesitation to say respondents' termination was substantially and procedurally unfair and

consequently, no sufficient grounds adduced to warrant revision of the CMA proceedings and set aside the award. It's therefore my finding that the first issue is answered negatively.

With regards to relief, since the applicant has not managed to adduce sufficient reasons to revise and set aside the decision of the CMA, I find this application with no merits. In this respect, the only remedy is not to the application.

On the above reasoning I hereby upheld the CMA award. The application is not allowed. Each party to take care of its own cost. It is so ordered.

Dated at Dar es Salaam this 10th day of August, 2022.

KATARINA REVOCATI MTEULE

JUDGE

10/08/2022