IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 537 OF 2020

SIMON PILI .....1st APPLICANT

RAMZAN OMAR.....2nd APPLICANT

STEVEN MTOGWA.....3rd APPLICANT

VERSUS

JCDECAUX TANZANIA LIMITED ..... RESPONDENT

(From the decision of the Commission for Mediation & Arbitration of DSM at Kinondoni)

(Massawe: Arbitrator)

dated 4th December, 2020

in

REF: No: CMA/DSM/KIN/815/2019

JUDGEMENT

10th February & 4th March 2022

Rwizile J.

This application is filed before this court to challenge the decision of the Commission for Mediation and Arbitration (the Commission).

The chamber summons that filed this application is supported by a joint affidavit of the three applicants. Although several issues were advanced as

at paragraph 7, only 4 of them were argued as shown here under. The rest were abandoned.

(a) *Whether the trial commission directed itself properly to dismiss the case against the respondent despite the fact that there was no agreement reached between the applicants and the respondent to be terminated on operational requirement.*

(b) *Whether it is proper for the trial commission to rule out that the respondent had valid reasons to terminate due to economic downfall while in fact there was no evidence to justify the same.*

(c) *Whether the trial commission directed itself properly to hold that termination was fair despite the fact that the Applicants were not supplied with relevant information and documents to prepare themselves for the consultative meeting.*

(d) *Whether the trial commission directed itself properly to hold that Ramzan Omar acted on behalf of Simon Pili and Steven Mtogwa in signing the minutes of the consultative meeting despite the fact that there was no power of attorney tendered before the trial commission.*

In essence, the applicants were employed by the respondent. Each of them was employed on a contract of unspecified term, which commenced on 1st February 2007 (P2), 1st June 2007 (P1) and 9th January 2017 (P3), for 1st, 2nd and 3rd respondents respectively. But the same were terminated on 30th September 2019 for operational requirements. The applicants were not satisfied by their termination and so preferred a dispute with the commission, claiming for benefits due to unfair termination. The commission heard the application and dismissed the same for want of merit. It was ruled out that they were entitled to severance allowance according to the agreement if it was not paid. Aggrieved, they have now filed this application asking this court to set aside the award and hold that they were unfairly terminated.

Before me, the application was argued by Mr. Dickson Sanga learned counsel for the applicants and Mr. Revocatus Thadeo for the respondent. Mr. Sanga argued the application and had this to say; The consultative meeting aims at reaching to an agreement between the parties. This according to him is governed by section 38(2) of the Employment and labour Relations Act (ELRA). The learned counsel added, that the above position was also propounded by this court in the case of **Saafa Plastics Ltd vs Yona Onesmo & 70 others**, Revision No. 71 of 2015 at page 11 and the case of

V-Marche Ltd vs Fitina Rashid Mloola, Revision No. 371 of 2019, at page 14.

Mr. Sanga further submitted that there is no agreement reached between the parties. What was tendered, he said, was the minutes of the consultative meeting styled as exhibit D3. To conclude this point, the learned counsel questioned the authenticity of the minutes tendered. In his view, the minutes were not signed by the applicants other than the 2nd applicant. He therefore doubts if the same are genuine because there is no reason why they did not sign when they were present in the meeting.

Arguing the second point, the learned counsel submitted that retrenchment was due to economic down fall. For the same to merit, he added, proof must be procured. He further submitted that, based on the case of **V-Marche Ltd** (supra), it is the employer cast with the duty of proving that retrenchment was indeed grounded on the reasons legally known. To cement this point, Mr. Sanga referred also to the case of **Romwald Bayeka and 4 others**, cited in the **Book of Formation and Termination of Employment Contracts in Tanzania** by Hamidu M.M Milulu, Chem-Chem Publishers, Dar-es Salaam: June 2013 at page 165. He said the alleged cause of retrenchment as financial constraints, was not proved, the court held it was unfair termination. He said, since allegations were flat with no proof of

economic constraints and that two workers were employed upon their termination, the reasons for termination were therefore not fair as required under section 37 of the ELRA.

Mr. sanga was also keen in discussing the third point. Here, it was his view, that in a consultation meeting, all key information must be disclosed. To justify this point, he cited section 37(1)(b) of the ELRA and, as well at page 167 of the **Book of Formation and Termination of Employment Contracts in Tanzania** (supra). He further said, Pw1 and Pw2 were not served with any relevant information before the alleged consultation meeting. The whole process was in his view contrary to section 38 of ELRA.

Lastly, he argued that since the 2nd respondent was not authorised by other applicants to sign the minutes, they were therefore not genuine.
In all, he submitted, section 37 and 38 of the ELRA were not complied with. He therefore asked me to set aside the award.

Mr. Revocatus, when given a chance to reply, was of the submission that, the law provides for grounds through which the award can be set aside. He argued that there must be misconduct on party of the arbitrator, it must be

improperly procured, if the arbitrator exercises jurisdiction he does not have or fails to properly exercise his jurisdiction and that if there is a material irregularity occasioning failure of justice as per section 91 (2) (a) (b), 94 (1)(b) (h)ELRA and rule 28 of the labour court rules. In his view, this application has only two issues to be determined, *which are; whether there were valid reasons to retrench the applicants* and *if the procedure for retrenchment was properly followed.*

The learned counsel further submitted that, the respondent was to prove the factors stated in the case of **Edward Ngwenge and 2 Others vs Pangae, Minerals Ltd**, Revision No. 106 of 2015 at 8. He stated, the employers need to prove finance constraints as the law states. He argued, retrenchment was fair as per section 38 of the ELRA since evidence was tendered to prove so. He referred to exhibit D2 which is a notice for consultation, minutes of the consultation meeting exhibit. D3, where reasons were given in the meeting and an agreement of payment of severance allowance as shown in the same. In his view, the application has to fail since the law was complied with.

In rejoining, the applicants reiterated their submission in chief. But added that the case of Edward **Ngwenge** (supra) is the good law supporting their case. This court is asked to set aside the award.

Having considered the submissions of the parties, it is pertinent to hold that the whole application as submitted by Mr. Revocatus for the respondent rests on whether the retrenchment was for valid reasons and followed procedure stated under the law.

Going by the record, there is no doubt that the applicants were retrenched. Retrenchment, in law, may be done for reason of operational requirements. However, the term refers according to section 4 of the ELRA and rule 23(1) of the Code of Good Practice, to be based on, economic, structural, technological or similar needs of the employer. But for retrenchment to hold, the principles as per section 38(1) must be met namely, **one,** give notice of intention to retrench. The notice, it has also been stated should be sufficient and be supplied to the workers. **Two**, disclose all relevant information for the intended retrenchment. This stage is important because it lays a good ground for the **third** step which is consultation. Consultation stated here should not only be done to the intended employees, but also to the trade union registered at the work place, if it exists. In doing so, reasons for the exercise must be stated, measures taken to minimize the intended retrenchment should be aired out.

Other things to be considered including mode of selection of the employees to be retrenched, timing of the same, as well as the possibility of paying severance allowance.

From evidence, the applicants were terminated on 30th September 2019 as their letters of termination clearly state. The process that led to their termination was commenced by a notice to the employees. This is exhibit D2. It was issued to them on 18th September 2019. The wording of the same is intrusive. It informed them that 4 employees will be retrenched as per clause 3. It proposed terminal benefits and was clear that severance payment would not be paid to employees who will not accept alternative employment as per clause 6. Clause 5 was categorical that the consultative process has to be finalized by 30th September 2019.

There is no evidence, if the same was also served on the trade union, if it existed. But following this notice, on 30th September 2019, the meeting was called and it is called a consultative meeting. This is exhibit D3. The meeting shows the employees were informed of what is to transpire in respect of retrenchment. It shows, it is through this meeting that they were informed of what will be paid to the affected employees. By clause 4.6, it states that

employees were asked to propose measures that would help to avoid retrenchment, where they unanimously had no alternative.

From the foregoing, it is crystal clear that retrenchment as shown before there must be transparence in the process.

The reason for doing so is obvious that, the employees are terminated without having committed any fault. That is why there must be adequate consultation and this should be too involving. Rule 23 (3) of the Code of Good Practice mandates courts to scrutinize a termination based on operational requirements in order to ensure that the employer has considered all possible alternatives before termination is affected.

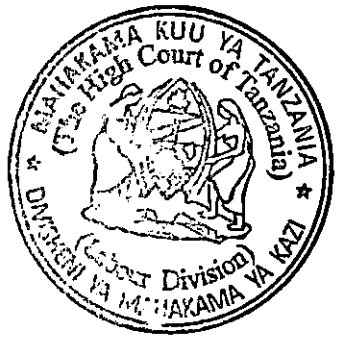
From the record, I doubt if this was done. To be able to see that the employer did not work according to the law, one looks at the timing of the events. The so-called notice was issued on 18th September as shown. It had almost concluded the process given its wording as I have shown above. It did not call the workers to the meeting but rather informed them that the process was to be concluded by 30th September.

It is indeed so; the meeting was held on the 30th September. There is no evidence that the applicants were informed that they will be retrenched. The meeting is alleged to come up with the agreement but it was not signed by

all applicants. It is only 2nd applicant who is alleged to have signed it. There was no representation of the trade union or evidence that the same did not exist at the work place. As well, other applicants were present but are not party of the same document. There is no evidence that they appointed him to sign on their behalf. It is also apparent that the applicants were terminated and issued with letters on 30th September -exhibits D5. Further payment was also effected on the same day.

This means, even though there were valid reasons for retrenchment, I am convinced that there was no adequate consultation. This procedural aspect was not complied with. It is, as well, apparent that the respondent had concluded the decision to terminate the applicants even before the process. That is why every crucial step on the process was done and concluded on the 30th September. It can be held, that the process of retrenchment was a mere exercised of passing time. This defeats the purposes for which the law was set. That, there is a need of joint problems solving exercise during the crisis. Therefore, the procedure for retrenchment was not complied with. In my view, this is enough to hold that the issue raised by the respondent's counsel on procedural fairness was not complied with. This is unfair termination. I therefore allow this application.

Having so held, I therefore order that under section 40 (1) (c) of ELRA, on top of what was paid at the termination. The applicants should be paid 12 months remuneration. No order as to costs.



A.K.Rwizile

JUDGE

04.03.2022