

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

REVISION NO. 275 OF 2021

VOLCAN LOGISTICS (T) LTD. APPLICANT

VERSUS

EMMANUEL WILBARD RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J.

The application is made under Section 91(1)(a) and 91(2)(c) Section 94(1)(b)(i) of the Employment and Labour Relations Act, Cap. 366, R.E. 2019 ("the Act") and Rules 24(1), 24(2)(b), 24(2)(c), 24(2)(d), 24(2)(e) and 24(2)(f), 24(3)(a), 24(3)(b), 24(3)(c), 24(3)(d) and Rule 28(1)(b), 28(1)(c), 28(1)(d) and 28(1)(e), of the Labour Court Rules 2007, GN. No. 106 of 2007 ("the Rules"). The Applicant is moving the court for an order in the following terms:-

1. This Honourable Court be pleased to call for records, inspect, examine such records therein and its proceeding to satisfy itself as to the correctness, rationality, propriety and legality of the Award in the labour Dispute No. CMA/DSM/TEM/191/18/81/2018 delivered by

Honourable M. Batenga-Arbitrator, dated 23rd December 2019 and served upon the applicant on 30th December 2019

2. This Honourable Court be pleased to revise and set aside Award in the labour Dispute No. CMA/DSM/TEM/191/18/81/2018 delivered by Honourable M. Batenga- Arbitrator dated 23rd December 2019 and served upon the applicant on 30th December, 2019.
3. Any other reliefs this Honourable Court deems fit and just to grant.

The application is supported by an affidavit of Mr. Godfrey Makubi Majura, Operations Manager of the Applicant dated 15/07/2021. The respondent opposed the application by filing a notice of opposition. The application was disposed by way of written submissions, the applicant's submissions were drawn and filed by Mr. Ashery Stanley, learned advocate while the respondent's submissions were drawn and filed by Mr. John Lingopola, learned advocate.

The background which leads to the current dispute is that the Respondent was an Employee of the Applicant under unspecified period contract effectively from 14th April 2014. He served in the position of Human Resources Manager and was earning a remuneration of Tsh. 1,955,715/= as a gross salary in accrual, at the end of every month.

Following an alleged retrenchment process by the applicant, on 10th February, 2018, the Respondent was terminated from employment and was paid all his terminal benefits as agreed in the retrenchment agreement signed by COTWU(T) as an exclusive bargaining agent on behalf of all employees. Subsequent to the termination, the respondents file a Labour Dispute No. CMA/DSM/TEM/191/18/81/18 claiming for unfair termination both substantively and procedurally and sought to be paid terminal benefits again. The CMA made an award in favor of the respondent declaring the termination as procedurally unfair and subsequently ordering the applicant to pay him a compensation equivalent to 12 months' remuneration totaling to Tshs 23,468,580/-. Aggrieved by the award, the applicant has lodged this revision raising an issue of legality of procurement of the award on the following grounds:

- (a) Trial Arbitrator erred in fact and law by holding that respondent was never properly consulted prior to retrenchment
- (b) Trial Arbitrator erred in fact and law by awarding respondent twelve months' compensation
- (c) Trial Arbitrator erred in law for failure to properly interpret the provision of the law regarding consultation prior to retrenchment.

(d) Trial Arbitrator erred in fact and law for failure to properly analyse evidence before her hence reached adverse decision against Applicant

I will begin with the first and third issues raised on whether there was consultation of the applicant before retrenchment. I have gone through the evidence adduced at the CMA and I agree with the respondent and the arbitrator that no consultation of the respondent was done before termination of the respondent. All the alleged appearances and presence of the respondent in the retrenchment process was in his capacity as a managerial personnel representing the employer and not part of the retrenchment process. Section 38(1)(d) of the ELRA requires an employer, in termination for operational requirements (retrenchment), to comply with several principles including giving a notice, make the disclosure and consult, in terms of subsection (d), with a recognized or registered trade union and in case the employee is not represented by a recognized or registered trade union, then he should be consulted personally.

Further to the above, as correctly held by the CMA, the negotiations, that the applicant is backing on, were between COTWU and the employer (applicant). By virtue of his position, the respondent was not a member of

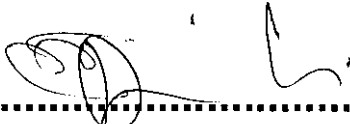
COTWU hence he did not form part of the employees whose interest were represented by COTWU during consultations.

It follows therefore, if the applicant knew that the respondent would be part of the termination and his position would be redundant, then she ought to have involved him in consultations as per the requirements of the law but as an employee and not a representative of the management. In the absence of such evidence, his termination remains unfair because the consultations that were ongoing were between the employer and the respective trade union while the respondent did not qualify to be a member of a trade union as he was in managerial position.

On those findings, I see no reason to interfere with the findings of the CMA that the termination of the applicant was procedurally unfair and the order for compensation was properly issued by the CMA. Consequently, this application is hereby dismissed in its entirety.

Dated at Dar es Salaam this 15th day of July, 2022.




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S.M. MAGHIMBI
JUDGE