IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 216 OF 2021

BETWEEN

HAMISI KONDO MZENGAEKA ..... 1ST APPLICANT
YUSUPH HUSSEIN MAGETA ..... 2ND APPLICANT
DOTO IGNAS SANGA .....3RD APPLICANT
ASIA MOHAMED IDDI ..... 4TH APPLICANT
SULTAN BAKARI MWEGERO ..... 5TH APPLICANT
YUSUPH EPHREM MNALI ..... 6TH APPLICANT
ZUBEDA ELIAS MWIRU ..... 7TH APPLICANT
CALISTER BEATUS KILAVE ..... 8TH APPLICANT
ZENA JOSEPH SEBASTIAN ..... 9TH APPLICANT
AISHA MOHAMED SAID .....10TH APPLICANT

VERSUS

DESKTOP PRODUCTIONS LTD. ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J.

The applicants moved this court by a Notice of Application and a Chamber Summons lodged under the provisions of Section 91(1)(a),(2)(a) and (b) and 94(1)(b)(i) of the Employment and Labour Relations Act, Cap. 366 R.E 2019, together with Rules 24(1)(2)(a)(b)(c)(d)(e) & (f) and (3)(a)(b)(c) & (d) and 28 (1) (a),(b),(c)(d) & (e) of the Labour Court Rules

G.N. No. 106/2007 ("the Rules"). They are praying before this court for the following orders:-

1. THAT, this Honorable Court be pleased to call for records revise the proceedings and set aside the award of the commission for mediation and Arbitration at Dar es Salaam in Labour Dispute No. CMA/DSM/TEM/287/2020/125/2020 by Hon. Mikidadi, A. (Arbitrator) ON 27th day of April, 2021.
2. Any other order this Honourable Court may deem just to grant.

The application was supported by an affidavit of Mr. David Andindilile, learned advocate representing the applicant, an affidavit which was deponed on the 04th day of June, 2021. The respondent opposed the application by filing a notice of opposition under Rule 24(4) (a)&(b) of the Rules, on the ground that there are no sufficient grounds to grant the orders sought by the applicants.

The application revolves around a disputed retrenchment of the applicants by the respondent on allegations of economic shortfalls following the break down of pandemic Covid 19. The applicants were employed by the respondent at different times and on different capacities. What they have in

common is that on the 20/02/2020, all the applicants were engaged on a fixed term contract of two years and three months each. The contract started deteriorating in April, 2020 when the respondent sent the applicants home on an unpaid leave of one month following the breakdown of pandemic Covid 19. On the 29/05/2020 when they reported back to work, they were given two options by the employer, the first option was that they go to another three months unpaid leave or in the alternative, they continue working on a salary cut ranging from 20%-40% for those with salary below and those above Tshs 400,000/- respectively. The applicants allege that there was never reached an agreement on this arrangement but they were eventually terminated on 30/05/2020. Aggrieved by the termination, the applicants unsuccessfully lodged a dispute at the CMA which found that the procedures and agreement on retrenchment was according to the requirements of the law. However, since the respondent could not prove that she paid the applicants their terminal benefits according to the alleged agreement, the respondent was ordered to pay the applicants accordingly. Aggrieved by the award, the applicants have approached this court raising the following legal issues:

1. Whether the honorable arbitrator erred in law and fact by holding that the reason for termination was fair despite the fact that there were no any reliable evidence that shows that there were economic hardship.
2. Whether the honourable arbitrator erred in law by holding that the procedure were followed despite the fact that notice for despite all irregularities transpired in the process of termination.
3. The trial arbitrator was biased by believing testified by the DW despite the fact that he was contradictory and without documentary evidence on the reason and procedure for retrenchment.
4. Whether honorable arbitrator erred in law and fact by not taking evidence in its entirety.

The application was disposed by way of written submissions. On the date set for hearing, Mr. David Andungulile, learned advocate, represented the applicant while Ms. Victoria Mgonja, learned advocate, represented the respondent. In his submissions to support the application, Mr. Andungulile initially prayed to adopt the contents of the affidavit in support of this application. He then started with the first issue on whether the arbitrator erred by holding that the reason for termination were fair while there were no reliable evidence to prove economic hardship. He was of the view that

our law accept economic hardship as one of the reason that the employer may use as a reason for termination. That the employer in this case mentioned the reason of termination of employment of the applicant as economic hardship that the company was facing. He argued that there is no any evidence whatsoever that is tangible to suggest that there were economic difficulties. Acknowledging that the time of termination was during Covid 19 pandemic, he argued that the pandemic did not discharge the employer's obligation to disclose evidence that suggest economic hardship facing the company.

Mr. Andungulile submitted further that although there was evidence that his clients were given unpaid leave in order to avoid congestion at the place of work, it wasn't for economic difficulties but it was to avoid congestion at place of work as rightly testified by PW1, evidence which wasn't contradicted by cross examination from the respondent's counsel. He therefore concluded that that leave given was not due to economic difficulties, supporting his submissions by citing the case of **Shadrack Balinago Vs. Fikiri Mohamed @ Hamza & 2 others, Civil Appeal No. 223 of 2017** Court of Appeal at Mwanza whereby the court stated at pg 20 para 2 that:

"We would therefore, agree with the learned judge's inference that the appellant's failure to cross examine the first respondent amounted to acceptance of the truthfulness of the appellant's account".

He pointed out that the position of PW1 was a true position to what happened during termination.

On the 2nd issue whether the arbitrator was right to hold that the procedures were followed despite the irregularities. Mr. Andungulile submitted that Section 38 of ELRA, read together with Rule 23 of the Employment and Labor Relations (Code of Good Practice) GN 42/2007 ("the Code") provides for requirements to be met in order to retrench employees and that one of those requirements is consultations. He elaborated that in consultation one of the requirements is disclosure on the reason for termination, which in our case it was economic. He argued that the employer was supposed to show the applicants that there were real difficulties and the criteria for selection of who are supposed to be retrenched and the reason why they are selected. He argued that in our case, there is no evidence as to why the applicants were terminated and others were not terminated. He pointed the evidence DW1 which is recorded to have said:

"mwezi wa tano walikaa kikao kingine na wafanyakazi wote na kufikia muafaka kwamba wafanyakazi wengine wataachishwa kazi wakiwemo walalamikaji na wengine wangeendelea na kazi kwa makubaliano ya kulipwa nusu mshahara, ndipo wengine waliachishwa kazi na kupokea malipo yao lakini walalamikaji walikataa kupokea malipo yao ingawa walipokea barua za kusitishiwa ajira pekee."

He then argued that it has not been explained why the applicants were terminated and the others were not, which suggests that the whole procedure of terminating the applicant was arbitrary and contrary to labor laws.

Mr. Andungulile argued issue No. 3 and 4 together which talked of analysis of evidence by the arbitrator. That had the arbitrator took the evidence in its entirety, he would have made findings in favor of the applicant. he argued that if we look to some of those facts that would have enabled the arbitrator to look at her findings, the findings would have been that the applicants were terminated unfairly. He then pointed out the contradictions of PW1, during examination in chief in which he testified that they agreed that some employees will go on leave without pay and others will remain but with half pay or reduced salaries and some will be retrenched.

He also testified that some were retrenched and others remained (page 3-4 of the award) and that during cross examination, the same witness who said that, testified that the factory was closed and those who remained were administration staff and experts from outside the country. that the question then comes if the factory was closing, what was the reason to include the employees and give them the three options that they were given.

He submitted further that another issue is that when you look at exhibit D2, it does not explain if there procedures prior to the termination. The exhibit only says that the employees were terminated on economic grounds. He argued that if the procedures were followed, then they could have shown in that exhibit D2 that there was that meeting and a certain decision was made. But apart from that tangible evidence, there is nothing else showing that there were procedures for termination going on.

He went on submitting that the other fact which was adduced by DW1 is that the applicants refused to receive their terminal benefits although they received termination letters. He argued that if there was an agreement to terminate the applicants through retrenchment, then how is it that the applicants refused to receive their terminal benefits. He then argued that Section 38 is clear that if the agreement for retrenchment has not been

reached, then the employer is supposed to take the matter to mediation. In this case, he submitted, although there was no agreement on retrenchment, the employer went ahead and terminated the applicants. He concluded that it is clear that the decision to terminate was one sided as the employer was the one dictating what is to be done hence the the termination of the applicants was not fair, he prayed that the court allow the revision and order the respondent to pay the applicants their salaries for the remaining period of their contract as prayed in the application form.

In reply, Ms. Mgonja also prayed to adopt the counter affidavit sworn by Christopher Mumani to form part of her submissions. On the first issue that the employer failed to produce evidence on economic hardship, her reply was that as per the evidence of DW1, he clearly said that the reason for termination was due to economic hardship caused by Corona, something which was worldwide which was a clear evidence and everyone suffered. That the main reason stated was that, the applicants were not terminated instantly; they were summoned, consulted and finally terminated. That the applicants were first given one month leave so as to reduce congestion at work place just like the counsel has said. That when they came back from the leave in May, they had another meeting with all the employees and that

agreed to retrench others and some of the employees received their terminal benefits while the applicants refused to receive it. She pointed out that in that meeting, it was explained that the clients were not coming in. So when they went home everyone had a clear picture of what was going on within the company, denying the allegation that there was no evidence of the reasons for the termination.

Ms. Mgonja pointed out that at page 5 of the award, the PW1 said:

> *"ndipo mwajiri alipoamua kuwaachasha kazi kwa kuwapatia barua mnamo tarehe 29/05/2020 na ajira ilikoma rasmi tarehe 31/05/2020 na kueleza sababu kuwa kampuni iliyumba kiuchumi. Alieleza kuwa wanapinga kuachishwa kazi huko kwasababu waliyoambiwa na muajiri kwani hakuwaonyesha nyaraka yoyote kuonyesha kuwa aliyumba kiuchumi bali aliwaambia kwa mdomo tu kupitia kwa wakuu wa vitengo na wala hakuwapatia kazi mbadala na badala yake alitoa mapendekezo kuwa baadhi ya wafanyakazi wangepatiwa likizo bila malipo ya miezi mitatu na ambao wangebaki kazini wangelipwa nusu mshahara".*

She hence argued that the evidence is clear that the applicants were aware that the company was facing economic hardship.

As for the second issue that the procedures were not followed, she submitted that this is also not true because the procedure was followed, the parties had several meetings and that is even why they agree to go on leave for one month to avoid congestion. That when they came back they were told about the position of the company and that is why there was a suggestion that some of them will be retrenched and some will be paid half salary.

On the 3rd and 4th issues on the apprehension of evidence, Ms. Mgonja submitted that the arbitrator was not biased because she analysed the evidence of both sides before reaching the decision.

Having heard the parties' rival submissions, I will start with Section 38 of the ELRA which deals with retrenchments, it provides:

38.-(1) In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, he 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 recognised trade union;

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

(2) Where in the consultations held in terms of sub-section (1) no agreement is reached between the not represented by a recognized trade union;

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

The procedures to be followed are further elaborated under the Rule 23 of the Code provides that:-

23.-(1) A termination for operational requirements (commonly known operational as retrenchment) means a termination of employment arising from the requirements operational requirements of the business. An operational requirement is defined in the Act as a requirement based on the economic, technological, structural or similar needs of the employer.

(2) As a general rule the circumstances that might legitimately form the basis of a termination are:-

a) economic needs that relate to the financial management of the enterprise.

b) technological needs that refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace.

a) structural needs that arise from restructuring of the business as a result of a number of business related

causes such as the merger of businesses, a change in the nature of the business, more effective ways of working, a transfer of the business or part of the business.

(3) The courts shall scrutinize a termination based on operational requirements carefully in order to ensure that the employer has considered all possible alternatives to termination before the termination is affected.

(4) The obligations placed on an employer are both procedural and substantive.

The purpose of the consultation required by section 38 of the Act is to permit the parties, in the form of a joint problem solving exercise, to reach agreement on:-

a) the reasons for the intended retrenchment (ie. the need to retrench;

b) any measures to avoid or minimize the intended retrenchment such as transfer to other jobs, early retirement, voluntary retrenchment packages, lay off etc.

c) criteria for selecting the employees for termination, such as last-in-first-out (LIFO), subject to the need to retain key

jobs, experience or special skills, affirmative action and qualifications;

d) the timing of the retrenchments;

e) severance pay and other conditions on which terminations take place; and

f) steps to avoid the adverse of the terminations such as time off to seek work.

(5) The requirement which the employer is required to adhere to under sub-section (1) of section 38.

(6) In order for it to be effective, the consultation process shall commence as soon as the employer contemplates a reduction of the workforce through retrenchment so that possible alternative can be explored. The process shall allow the union to:-

a) meet and report to employees;

b) meet with the employer, and

c) request, receive and consider all the relevant information to enable the trade union to inform itself of the relevant facts for the purpose of reaching agreement with the employer on possible alternative solutions.

(7) The more urgent the need by the business to respond to the factors giving rise to any contemplated termination of employment, the more truncated the consultation process may be, Urgency may not, however, be induced by the failure to commence the process as soon as a reduction of the workforce was likely. On the other hand, the parties who are required to reach agreement shall meet, as soon and as frequently, as may be practicable during the process.

(8) Section 38 (2) of the Act provides that into agreement is reached between the parties, the matter shall be referred to mediation by the Commission for Mediation and Arbitration. An agreement reached between the employer and a trade union recognized as the exclusive bargaining agent, is binding on all employees within the bargaining unit in terms of section 71 (3) of the Act.

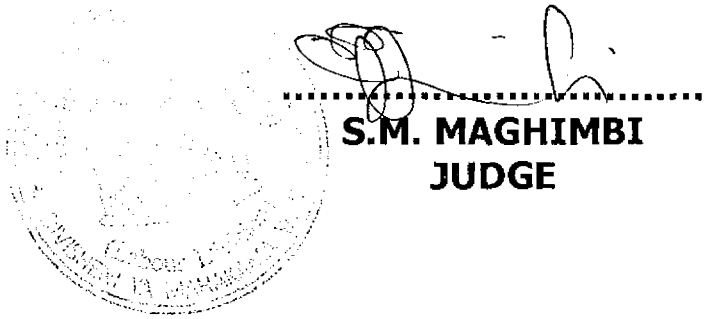
(9) The employer may not implement the retrenchment within 30 days of the referral to mediation, unless otherwise agreed between the parties. Once this period has passed, the employer may proceed with the retrenchment unilaterally. The fairness of the employer's actions may be disputed and referred to arbitration, once the mediation fails.

I have taken time to scrutinize the exhibits that were tendered to prove termination and there is no exhibit like minutes of meeting or any proof that there was actual consultation between the parties. I have noted that in her award, the arbitrator relied on the evidence of PW1 whom she alleged to have admitted that there was consultation. The question that the arbitrator was to pose and ask is if the meeting of the parties was for the purpose of negotiating the retrenchment package as per the requirement of the law or it was just an ultimatum meeting. Since there is no any exhibit that documented the said consultations, I will re-analyse the evidence to see whether there is an establishment of the meeting of the minds and any negotiations for that matter.

The exhibits tendered include Collective EXD1 which is the contract of employment of the respondents a contract which commenced on the 01/01/2020 to end in 31st March, 2022. EXD3, which are the salary slips for the month of June and other terminal benefits upon termination. There is also EXD2 which is a termination letter of the applicants. In the said letter (EXD2) there is nowhere that the said "negotiations" were referred to by the employer.

amount that will be proved by the respondent to have been received by any of the applicants shall be deducted from the payments.

Dated at Dar-es-salaam this 29th day of August, 2022



S.M. MAGHIMBI
JUDGE