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

CONSOLIDATED REVISION NO. 135 & 148 OF 2022

(Originating From Labour Dispute CMA/DSM/TEM/228/2013)

BETWEEN

STANLEY NYAKUNGA ..... 1ST APPLICANT
DORIS MALYI .....2ND APPLICANT
MWANTUMU SAGUTI ..... 3RD APPLICANT
DAVID KAPINGA ..... 4TH APPLICANT
ATHUMAN USAGA ..... 5TH APPLICANT

VERSUS

MOFED TANZANIA LTD. ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

Both consolidated revision applications were lodged under the provisions of Section 91 (1)(a)(2)(b)(c); 94(1)(b)(i) of the Employment and Labour Relations Act, No. 6 of 2004 and Rule 24(1)(2)(a)-(f); 24(3)(a)-(d) and 28(1)(a)(c)(d)&(e) of the Labour Court Rules, G.N. No. 106/2007. The consolidated revisions emanates from dispute arising from a failed employer employee relationship gone bad. In the award of the Tribunal, it was ordered that the employer re-engage the employees pursuant to Section 40(1)(b) of the ELRA. A month after the order of the CMA, the employer revealed her intention not to re-engage the employee and instead, offered compensation

to the tune of 12 months' salary for each employee. Not satisfied with the offer, the employees lodged an Execution application before this court claiming to be paid a salary of their estimation. The employer objected the amount and in his order dated 21/10/2021, the Honorable Deputy Registrar referred the parties to the CMA so that the actual amount of money to be paid to the employees is quantified. The employees filed a Misc. Application No. CMA/DSM/TMK/228/2013/4/2022.

In her ruling, the arbitrator ordered the employer to pay each employee their salary from the date of their termination to the date when the employer showed an intention to pay them compensation, which came to a total of 27 months. A total sum of Tshs. 110,591,835.30 was to be coughed by the employer to pay the employees. Unfortunately, both the employer and employees were aggrieved by the award of the CMA and have lodged the two revisions on the following grounds:

The employees raised grounds were:

1. That the Honorable Arbitrator erred in law and fact by decided that applicants are entitled to be paid 12 months compensation and 27

Months salaries from the date of termination to 2015 when respondent was ready to pay.

2. That the Honourable Arbitrator erred in law to interpret properly Section 40(3) of the Employment and Labour Relations Act, Cap 366 R.E. 2019 and arrived to unjustifiable decision.

On her part, the employer raised the following grounds:

1. That the decision of the CMA dated 14th April, 2022 which is sought to be revised is unlawful, illegal, illogical and irrational because it is issued in contradiction to Section 40(3) of the ELRA (Supra). Section 40(3) only allows compensation of (12) twelve months' wages and not beyond.

When this matter came for hearing on the 19th September, 2022, the employer was represented by Ms. Regina Kiumba, learned advocate while the employees were represented by Mr. Remmy William, learned advocate.

Having considered the submissions of both parties and the records of this revision, I find the main issue for me to determine is the alternative remedy to the order of re-engagement that was issued by the arbitrator in the original labour dispute. According to Ms. Kiumba, the order commenced

on 25th September, 2015 and a month after, the employer informed them that she is not ready to re-engage them but instead she was ready to compensate them 12 months' salaries. She argued that the Hon Arbitrator was in error when she computed payment of salaries from the date of unfair termination, 2013 to 2015 when the matter was still in court.

On his part, Mr. Remmy challenged the computation on the ground that the arbitrator was supposed to grant the employees all salaries due from the date of unfair termination to the date of final payment and 12 months compensation in the event the employer was not ready to re-engage them. His argument was that the position of Section 40(3)(c) of the ELRA requires an employer, if she decides not to re-engage the employee, to pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment.

Mine is a single, might seem simple but very complex task, it is to interpret the meaning of the provisions of Section 40(3)(c) in cases where the employer decides not to re-engage the employee, in relation to other subsequent litigations lodged by the parties to challenge the decision and time frame within which the compensation should be calculated.

There is also another point raised by Ms. Kiumba that since re-engagement creates a new employment relationship between the employer and employee and not the old one; then it is different from re-instatement hence the calculation for the purpose of compensation should be different. Her argument was that hat the employee cannot enjoy full benefits of the old employment because this is a new relationship starting from the day an order of re-engagement was issued and it is very different from re-instatement. Ms. Kiumba emphasized that since the order of re-engagement was issued on 25th September, 2015'; that is when this new relationship between the employee and the employees commenced and on 28th October, 2015 the employer showed her intention not to re-engage the employees.

In reply, Mr. Remmy agreed with Ms. Kiumba that re-engagement creates a new relationship with the employee. He was however quick to distinguish the fact with the situation at hand submitting that the point would have fit in the case where the employer complied with the order to re-engage the employees which would lead to a new relationship whereas the employer and employee will reach to new terms of employment contract. That in the circumstances of the present case, it is different because the employer was

not ready to re-engage the employee and the only remedy available to the employee were the ones stated under Section 40(3)(c) above.

To start with, I am in agreement with Mr. Remmy that the issue of re-engagement creating a new relationship between employer and employee, true as it is, it is not relevant in our situation. Since the employer has expressed, without hesitation, her intention not to re-engage the employees, our concern will only be based the alternative remedy of re-engagement as stipulated under Section 40(3)(c) of the ELRA. The Section provides:

> *"Where an order of reinstatement or re-engagement is made by an arbitrator or Court and the employer decides not to reinstate or re-engage the employee, the employer shall pay* ***compensation of twelve months wages in addition to wages due*** *and other benefits* ***from the date of unfair termination to the date of final payment.***"

In its very plain language, the argument of Ms. Kiumba fails, the Section is clear by the use of the word "shall", that the compensation of 12 months wages **is in addition to wages due** and other benefits; from the date of unfair termination to the date of full payment. Since the

compensation of 12 months is undisputed by both sides, that part of the award will not consume much of time. It is hereby upheld.

The remaining part to be determined is what are ***the wages*** and ***other benefits due*** that the employer owed the employees and what the threshold is or what is the cut off point in the meaning of ***"from the date of unfair termination to the date of final payment"***. By wages due, it means that the wages that the employer is supposed to pay the employees in alternative to the order of re-engagement, which the outstanding wages from the date of termination to the date of full payment. It should be noted that the cutoff point, or the date of full payments is still in dispute and shall be determined in due course. But it is important that the wages due are clarified to be the wages from the date of termination to the date that shall be soon determined hereunder.

In determining what is the last date to count the responsibility of the employer to compensate the employees as per Section 40(3)(c) of the ELRA, I have considered Ms. Kiumba's argument that the employees are the ones who have been filing these endless litigations at the High court so they cannot eat their cake and have it. That they are the cause of the whole delay and even the arbitrator saw that the employer was ready to pay

compensation way back and that the employer cannot pay the employees money for any work done for all this period and it is on their own cause and not the employer's. I have considered this argument because of the sense that it brings. It is obvious that after the employer showed her intention not to re-engage the employees, the proper remedy was for the employees to go back to the CMA and have the alternative remedy determined therein. However, this is not what the employees did, they lodged a revision application in this court and further application for Execution No. 391/2017.

In the said applications above, they came up with their own figures to be paid and it is out of that figure, the Hon. Deputy Registrar ordered parties to go back to the CMA to quantify their damages because the award they intended to execute did not order what they demanded in Execution Form No. 10. Therefore it is undisputed that all this time lapsed at the instance of the employees. This is when I come to the issue in question, the cutoff point upon which the respondent must compensate the employee in cases where the law provides for a term of a date of full payment. I shall strive to elaborate hereunder.

It is common understanding that compensation is intended to reflect the claimant's losses that were incurred by the deed of his/her counterpart.

However, in cases like the one at hand, particularly the provisions of Section 40(3)(c), it is difficult to accurately determine the reflection of the loss due in relation to what the law provides in relation to the subsequent activities of the parties. Should this provision be left open, like what Mr. Remmy would wish for the court to determine, then it will be an open opportunity for employees in favour of whom re-engagement order has been issued, to file endless litigations so as to add value to the period between "*time of termination to the date of full payment*" as prescribed under the Act. It will be difficult to control and demarcate when to stop the computation in cases where the party is taking advantage of the open-ended nature of the provisions by extending the situation through unwarranted litigations. The case would have been different and looked at from a different perspective if the litigations were initiated by the employer, considering that interest is not charged on the accrued amount. It would have also been different if after the order of re-engagement had been issued and the employer showing intention not to re-engage, then the employer drags feet in making the payment as prescribed under the law, in such circumstances, the strict interpretation of the clause *time of termination to the date of full payment* would have come into play without any alterations or interpretation. My take

would be that the intention of the legislature was to bar the employers from dragging fit to make the final payment by counting each date of delay in payment of the employee in case no further litigation is initiated or when initiated by the employer. It did not mean to be a source of capital for the employees to extend that time by filing endless litigations just to add value on the factor of time, the date of full payment.

On the other hand, Ms. Kiumba argued that the only relief that the employer is willing to pay is compensation of twelve months, arguing that because the order of re-engagement creates a new relationship, then there is no wages due and there are no benefits because this is a new relationship. With respect to the learned Counsel, the provisions of the Section 40(3)(c) of the ELRA are not in conformity with her argument. The Section clear that when the order of re-engagement is made and the employer decides not to re-engage the employee, the employer shall pay compensation of twelve months wages ***in addition to wages due*** and other benefits. Therefore the primary compensation to be paid is the wages and other benefits and in addition to that, then the employer shall also pay a compensation of 12 months. It is obvious hence, the relief of Compensation for twelve months is not the only alternative to re-engagement, it an addition to the wages and

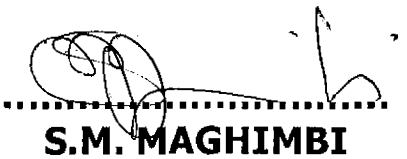
benefits due to be paid to the employer and that is why the words used in the Section are "in addition to other wages and benefits" which means the employee should be paid in full the wages and all consequential benefits due.

On the above analysis and findings, under circumstances such as the one at hand, the employee would have to be compensated for not having been paid the compensation which is full wages and all consequential benefits at the time when it was rightfully due. The time that the compensation was rightfully due was the time when the employer showed her intention not to re-engage the applicant and was ready pay them in alternative, which was on 28th October, 2015 when the employer was not ready to re-engage the employees and not the 25th September, 2015 when the award was issued. This is because for the period between the 25th September to 28th October, 2015, re-engagement was the remedy awaiting to be executed and the computation of wages for the purpose of date of full payment was still running.

In conclusion, I am in full agreement with the ruling of the CMA on the computation of time within which compensation should be paid. It is the period between the date of termination which was in July 2013 to the 28th

October, 2015 when the employer showed her intention not to re-engage the employees. In the upshot, both revisions lack merit and are hereby dismissed.

Dated at Dar es Salaam this 13th day of October, 2022.



S.M. MAGHIMBI
JUDGE