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

## REVISION NO. 441 OF 2022

(From the decision of the Commission for Mediation and Arbitration at Ilala in Labour Dispute No. REF: CMA/DSM/ILA/893/20/455/20, Nyagaya, P.: Arbitrator, Dated 11th November, 2022)

**BETWEEN**

**BENJAMINI HIPPOLYTE BITANYI ..... 1ST APPLICANT**

**AHMED ISSA ABDUL ..... 2ND APPLICANT**

**HAJI RAJABU MADAWILI ..... 3RD APPLICANT**

**STEVEN RASHID TALAMILE ..... 4TH APPLICANT**

**ELIZABETH CHARLES MASOLWA ..... 5TH APPLICANT**

**VERSUS**

**EMIRATES TANZANIA ..... RESPONDENT**

## JUDGEMENT

15th – 29th May, 2023

**OPIYO, J**

Applicants were employed by the respondent on various positions. In the year 2020 they were terminated on the reason of operational requirement. Dissatisfied, they filled for their dispute at the Commission for Mediation and Arbitration (CMA) having dispute No. CMA/DSM/ILA/893/20/455/20. The matter was heard and the award held by honourable Nyagaya, P. (Arbitrator) dated 11th November, 2022 was pronounced in favour of the respondent. Aggrieved, applicants filed

for this application asking this court to revise and set aside the CMA award.

The application was supported by the applicants' affidavit having the following grounds for revision: -

i. *Whether it was proper for Commission to dismiss the complaints presented before it.*
ii. *Whether it was proper for Commission to hold that the termination was fair procedurally and substantially.*
iii. *Whether it was proper for the Commission to ignore the import and implication of exhibit C4 in relation to the grounds of retrenchment.*
iv. *That, the Commission failed to analyze and consider the evidence of PW-1.*

The matter proceeded by way of written submissions. Both sides filed their main submissions. There was no rejoinder done by the applicants. Both parties got the opportunity to be represented by Learned Advocates. Mr. Omari Msemo from Tan Africa Law Chambers was for the applicants whereas Mr. Rwekamwa Rweikiza from FB Attorneys appeared for the respondent. In his submission the counsel for the applicant merged to two the legal issues to whether it was proper for the Commission to hold that the termination was fair procedurally and

substantially and whether it was proper for the Commission to dismiss the complaints presented before it. He submitted in the line of these issues only.

On the first issue Mr. Msemo submitted that there were irregularities in the retrenchment process. He continued that there was no reason for retrenchment as the alleged Covid 19 outbreak by the time applicants were terminated was already being controlled to the extent that the airline business resumed in its normal routine. He stated further that, the proof of it is exhibit C4 which was the email informing staffs that their salaries will be reinstated to 100% from 1st October, 2022. In his view, there was no any valid reason for termination of the applicants based on operational requirement.

He then added that the ignorance of the contents of exhibit C4 by the reason of it being electronic evidence is a misconception of the law as PW1 stated that, he is the one who printed it and so there was no need of observing electronic evidence procedures because he was the one who owned the facts and the evidence used was under his control. To cement his point, he referred to the case of **EAC Logistic Solution**

**Limited vs Falcony Marines Transportation Limited**, Civil Appeal No. 1 of 2021, High Court at Kigoma.

Mr. Msemo submitted further that one aspect of procedure as per the law is to disclose all relevant information on the intended retrenchment according to section 38(1) of CAP. 366 R.E. 2019. He continued that applicants were never given enough/relevant information prior to their termination. He went on saying that on 17th September, 2020 applicants received information that there will be a meeting on 18th September, 2020, but the agenda and the purpose of the meeting was not disclosed. Again, he submitted that criteria in respect of termination was not disclosed and so it went contrary to section 38(1)(iii) of CAP. 366 R.E. 2019. In his view the procedure for termination was not followed and that makes termination unfair.

On the second issue Mr. Msemo contended that it was not proper for the CMA to dismiss applicants' application as there was no reason for termination and even if reason was there the procedure for termination was not followed. On the issue raised by the respondent that PW1 did not testify on behalf of other applicants, he submitted that not the number of witnesses that matters, but the weight of evidence adduced.

In response, Mr. Rweikiza on the issue of reason for termination submitted that applicants were retrenched for operational requirement necessitated by the outbreak of the Covid 19 pandemic which resulted in global travel bans and negatively impacted the revenue of the respondent. He continued that, International Civil Aviation Organisation (ICAO) estimated in the first quarter of 2020 the overall foreign airline passenger capacity would go down and the same was testified by DW1 that the pandemic started impacting the respondent's business when the World Health Organisation (WHO) declared Covid 19 as a global threat on 11th March, 2020. DW1 also stated that on 25th March, 2020 to August, 2020 the respondent stopped flights to and from Tanzania. In August, 2020 the respondent started operations in Dar es Salaam, but not into its normality as they were reduced from seven to three flights in a week, but still the number of passengers where still low compared the number before the pandemic. In all the operation had not returned to its normality even at the time he was testifying in year 2021.

He then submitted that DW3, who is the accountant of the respondent stated that the financial year spanned from 1st April, 2020 to 31st March, 2021 the respondent lost TZS. 12.7 trillion, that being 67% of the sales

of the financial year ended on 31st March, 2020. He continued that exhibit D9 reveals respondent's economic hardship which forms the basis for termination resulting from operational requirement in terms of the decision in the of **Kuehne and Nagel Limited vs Grace Urassa,** Labour Revision No. 190 of 2019, High Court at Dar es Salaam he cited in support. He went further stating that DW2 with evidence produce in exhibit D6 proves that termination of applicants was on financial problems. In supporting his points of covid 19 to be a good ground for retrenchment he referred to cases of **Elizabeth Emmanuel Wangai & 128 Others vs Hodi Hotel Management Co. Ltd**, Labour Revision No. 123 of 2021, High Court at Arusha and **Kibo Guides (T) Limited vs Hans John Assey**, Revision Application No. 43 of 2021, High Court at Arusha.

He further submitted that PW1 during hearing did not talk anything to fault the validity or fairness of the reason necessitating retrenchment for all applicants also that, other applicants' evidences were not shaken on proving the fairness and validity of the reason for retrenchment. To support his point, he referred the case of **Shemsa Khalifa and two others vs Suleman Hamed**, Civil Appeal No. 82 of 2012, **Ismail Rashid vs Marium Msati**, Civil Appeal No. 75 of 2015, **Jacob Mayani**

**vs Republic** [2020] TLR 397 and **In Brorwne vs Dunn** [1893] 6R H.L where it was held that one a party fails to adduce evidence in support of his pleadings, such claims are deemed as having been abandoned. On the issue of exhibit C4, he submitted that the company stated that it will reinstate employees' salaries to 100% without indicating that the Covid 19 pandemic was over or that the number of flights to and from Dar es Salaam had resumed to seven as it used to be. Therefore, retrenchment was among the measures taken to ensure that the remaining workforce continues- to get the reinstated salaries.

On the issue of procedure for retrenchment, Mr. Rweikiza submitted that the arbitrator based her decision on exhibits D1 and D4. For him the arbitrator adhered to section 38 of CAP. 366 R.E. 2019 and rule 23 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 which provides for giving notice of intention to retrenchment, disclose all relevant information, consultation prior retrenchment. Thus, retrenchment procedure was followed. He elaborated further that on 16th September, 2020 the respondent issued a notice of intention to retrench to all employees (exhibit D2), the said meeting took place on 17th September, 2020 and employees were informed about the intention to retrench some employee (exhibit D1).

He continued that, on 24th September, 2020 the respondent issued a notice of consultation meeting to each applicants narrating the agenda (exhibit D3), the meeting took place on 28th September, 2020 (exhibit D4), On 30th September, 2020 a notice of intended termination was issued (exhibit D5) and on 23rd October, 2020 termination letter was issued (exhibit D6) and rightful terminal benefits were paid and they issued certificate of service (exhibit D7). He then prayed to the court to uphold the CMA decision as the respondent followed procedure on retrenching the applicants.

On the part of reliefs, he submitted that applicants are not entitled to any relief after the determination that reason and procedure for retrenchment were fair. Also, that applicants are not entitled for any relief because they claimed different amounts; under part 3 of the form claimed for TZS. 217,000,000/= and under part 4 they claimed for payment of twenty-four months' salaries and general damages for psychological torture. He continued that applicants also failed to indicate entitlement of each applicant if at all the matter was decided in their favour. In his view, it is hard for the court or CMA to guess the entitlement of each applicant. He then submitted that unless the relief is incidental to the specific prayer in the pleadings, courts/adjudicators are

barred from granting relief which are not prayed for in the plaint. To cement his point, he cited cases of **Dew Drop Company Ltd vs Ibrahim Simwanza**, Civil Appeal No. 244 of 2020 and **Antony Ngoo & Another vs Kitinda Kimaro** [2014] TLR 34. Adding up he submitted that, the form is so significant in referring a dispute to the CMA as it plays a role of a plaint in initiating suits in other civil matters. He supported his point by referring to the case of **Judicate Rumishael Shoo & 64 Others v The Guardian Ltd**, [2011-2012] LCCD 20, High Court of which within the case of **Powers Roads (T) v Haji Omari Ngomero**, Labour Revision No. 36 of 2007 was referred. Then he prayed for this court to uphold the CMA decision.

After perusal of both parties' submissions, CMA records and exhibits thereto, this court have been called to determine whether there was a reason for retrenchment, whether procedure for retrenchment was followed.

There is no dispute that applicants were employed by the respondent and that they were then terminated by way of retrenchment. Retrenchment as provided under rule 23(1) of the Employment and

Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 means

> *"A termination for operational requirement (commonly known Operational as retrenchment) means termination of employment arising from the requirement 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."*

Rule 23(4) of G.N. No. 42 of 2007 gives obligation to the employer (in this case the respondent) to prove reason for retrenchment and also that if he/she followed procedure to retrenchment. It states that the obligations placed on an employer are both procedural and substantive.

On the part of reason for retrenchment; the applicants stated that the respondent had no reason for retrenchment because by the time they were retrenched the respondent had already went on paying them their full salaries meaning the reason had ceased. Whereas, the respondent through her advocate stated that she had suffered economically and even though she went back on paying her employees full salaries it did not meant that her economic situation went back to normal.

Records show that exhibit D9, the annual report of the respondent presented and tendered by the third witness proved that the respondent had economic difficulties. Not only that, but also the 1st applicant himself agreed that by that time covid 19 pandemic that caused their salaries to be reduced was still persisting. This is according to exhibits C2 and C3. This shows how bad the economic was on the side of the respondent which led to the deduction of the basic salary to 50%. Not only that but also PW1 admitted during cross examination that by the time they were retrenched covid-19 pandemic was still there. For easy reference: -

This means, Covid-19 pandemic was still there during the time the applicants were retrenched. All these put together, prove that the respondent had the reason to retrenchment as Covid-19 pandemic caused economic loss on her party. For that matter I concur with arbitrator's findings that there was valid reason for retrenchment.

On the issue of procedure for retrenchment, section 38(1) of the Employment and Labour Relations Act provides for principles to be followed in retrenchment. It states:-

*"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 –G*

*(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 retrenchment;*

*(v) and severance pay in respect of the retrenchment,*

*(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 recognized trade union;*

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

As the provision above provides, examining what is in the records, I do not hesitate to come to the findings that procedure for termination was followed. This is because, for retrenchment procedures to be followed there must be a notice, disclosure of relevant information, consultation to the employees, measures to avoid, method of selection, timing of the retrenchment, severance pay and disclosure of information to the employee or his/her advocate. Exhibits D1 and D2 proves that applicants together with other employees were served with relevant notices.

On disclosure of relevant information, consultation to the employees, methods of selection, timing of the retrenchment and disclosure of information to the employee or his/her advocate exhibit D3 proves that they were adhered to. For easy reference, it reads in part as follows: -

> *RE: NOTICE OF CONSULTATION MEETING*
>
> *Reference is made to section 38(1)(c) of the Employment and Labour Relations Act, 2004, and the Notice of Retrenchment served/communicated to you recently. In that respect, the Management of Emirates Tanzania invites you to attend a consultation meeting to be held on Monday 28 Sep 2020 at 10:301m at Haidery Plaza Town office.*

*The proposed main agenda for the meeting is as follows:*

*(i) Reiterating the reason for retrenchment*

*(ii) Measures taken by Emirates to avoid or minimize the impact of retrenchment*

*(iii) Criteria for selection of employees for retrenchment*

*(iv) Timeframe of the process*

*(v) Severance pay and other statutory payments*

*(vi) Any other business*

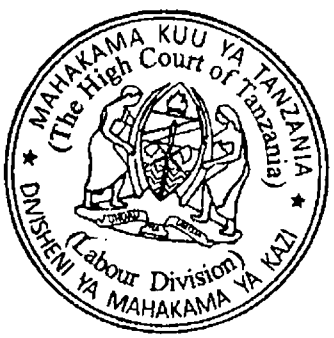
*We reiterate, in good faith, that a consultation meeting is a participatory decision making forum between you and the Emirates so as to ensure a smooth parting, while hoping to rejoin in future when the situation resets into normality. With that sense, we urge you to make proper consultation with your attorneys or friends and relatives acquainted with labour laws on your rights in relation to retrenchment.*

..."

Exhibit D4 (the minutes for consultation meeting) shows that the criteria used to choose employees to be retrenched was choosing the departments to be redundant and the junior employees. It also showed the time frame was from 01st to 31st October, 2020. Furthermore, exhibits C2 and C3 proves that the respondent used other measure of reducing her employee's salaries from 25% to 50% before reaching to the decision of retrenching some of her employees, applicants being among them. Not only that, but also exhibit D7 (pay advice) shows payment made to the employees who were retrenched applicants inclusive.

What is proved by the above finding is that, the respondent on retrenching the applicants fairly adhered to all procedure to the letter.

As it has been proved that the respondent had valid reasons for retrenchment and she substantially adhered to the procedure involved, this application is left without merit. I therefore proceed to dismiss it for lack of merits. CMA award is upheld. No order as costs to either party as this is the labour matter.




**M. P. OPIYO,**

**JUDGE**

**29/05/2023**