IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM
REVISION NO. 356 OF 2022

(Arising from the Labour Dispute No. CMA/PWN/MKR/55/2021 of the Commission for Mediation and Arbitration at Mkuranga, Dated 21st April, 2022)

NEELKANTH SALT LIMITED.....APPLICANT

VERSUS

SIWEMA SALUM SHABANI.....1ST RESPONDENT

ABDUL OMAR MBEGU.....2ND RESPONDENT

ALLY M LIBACHA.....3RD RESPONDENT

ASHRAF M. MGUNYA.....4TH RESPONDENT

JUMA A. NGWELE.....5TH RESPONDENT

MWAJUMA S. MIAKA.....6TH RESPONDENT

ALLY S. MWANGIA.....7TH RESPONDENT

MWALIM S. MWANGIA.....8TH RESPONDENT

ALLY'S MAANJE.....9TH RESPONDENT

JOSEPH N. SICHILIMA.....10THRESPONDENT

JUDGEMENT

29th May, - *12th June, 2023*

OPIYO, J.

The hearing proceeded orally on 29/5/2023, the respondent got the opportunity to be represented by the Learned Advocate Ms. Winny Kimaro. While the applicant appeared throung Mr. Oscar Harris, her Legal Officer. In bringing the application home, Mr. Oscar submitted that the arbitrator

erred in awarding the respondents 8 months salary compensation to the total of 11,920,000/=. He stated that the arbitrator misdirected himself and failed to understand that termiantion of employment contract was by way of agreement as per rule 3(2) and rule 4(1) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007. That, DW1 showed that the parties were terminated by agreement by tendering relevant documents (exhibit D12 -21) to prove that. The documents were signed by all parties that the contract was to end by agreement.

In his view, the agreements were in accordance to section 10 of the Law of Contract Act [Cap 345 RE 2019] which provides that, agreements are contracts only if they are out of consent of both sides involved. He cemented his point by referring to the case **Yara Tanzania Ltd v. Catherine Asenga, Rev. No.88/2020, Hc Labour Div. DSM of (unreported)** at **page 14 paragraph 4** where it was stated that parties are bound by their agreement and court should not have power to interfere unless it is proved that the agreement was out of duress or inducement and **Shilohona Mamboleo vs Dar es Salaam International Academy** Rev. NO. 20 of 2021 Labour Division at page 11 which insisted on the same. For him, the arbitrator misdirect his mind to that evidence and ended in deciding that termination was through retrenchment.

On the second ground, he submitted that,the arbitrator reached ambigious and contradictory decision at the same time. He was of the view that, the arbotrator erred in determination of the first issue raised at trial as to whether, the reason for termiation was valid. He stated that, at page 10 of the award paragraph 1 on the forth line the arbitrator stated that there was valid reason for termination and answered the issue in the affirmative, at the same time at page 11 paragraph 1, 16th line he confused himself by stating that there was no proof of termination by way of agreement. For that he argued that, the arbitrator contradicted himself for answering the first issue resulting into errorneous award which was unfair on the applicant's side.

On the third ground he submitted that the arbitrator did not give regard to exhibits that was tendered before her which were exhibit 11 (minutes of the meeting). He continued that, the exhibit shows what transpired on 12th April, 2021 in the meeting of which the agenda was termination of employment by agreement and they even discussed terminal benefits that was to be paid to the employees. The employees were subsequently duly paid according to what was discussed.

He submitted further that, the arbitrator did not consider exhibits D22 – 31 which showed that contract was terminated through mutual agreement. He stated that the respondents signed documents terminating their contract by agreement and signing such agreement was a result of what they had agreed in the meeting. He continued that, what was agreed was salary of the days they worked up to termiation of contract, payment in lieu of notice, leave pay and severance payment plus bonus constituting one month salary. Also, the agreement was that the employees be helped to get their dues from pension funds and they be issued with certificate of service. In his view, it was not proper for the arbitrator to ignore such vital evidence tendered before him.

On the fourth ground he submitted that, the arbitrator erred in stating that applicant did not follow procedure in terminating the employment contracts of the respondents. He interpreted wrongly that the termiantion was by way of reitrenchment and therefore analysed different procedures relating to rentrenchment instead of termination by agreement procedures. He continued that, the applicant insisits that she followed all procedures that were to be followed in such circumstance as she notified the employees about the meeting on 09/04/2021. The meeting was held on 12/04/2021 which discussed the said termination. To support his point he referred to

the case of **Uniliver(T) Ltd vs Benedict Mkasa t/a Bema Enterprises** Civil Appeal No. 41 of 2009 CAT at page 16.

He then turned to the fifth ground where Mr. Harris submitted that, the arbitrator erred in allowing the then applicants at trial to file a representative suit without following procedures for filing a representative suit. He contended that rule 29(1)(c) of Labour Institutions (Mediation and Arbitration) Rules [G.N. No. 64 of 2007] explains procedures for applying for a representative suit in a matter before CMA. The said procedure was not followed. He backed his point by referring to the cases of **Abdallah Mohamed Msakandeo and Others vs City Commission of Dar es Salaam and 2 others** which gives directive on what one has to consider in determining granting of representative suit order, and the case of **Gibson Weston Kachingwe and 620 others vs Tanzania Plantation and Agriculture Workers Union TPAWU and another. Misc. Application No. 759/2019 HC, DSM (unreproted) at page 5 paragraph 1** which stated that the application to file representative suit will be granted if they have common interest and they made application for represention order. He added that, in hearing of the matter the then applicants did not meet the criteria. He then prayed for the decision to be accordingly revised, award be quashed and set aside.

In response, Ms. Kimaro submitted that the arbitrator did not err in her award as she correctly held that the termiation was based on operational requirements. The decision was in accordance to the testimonies and exhibits admitted. She continued that the attendence signed at the meeting which is alleged to be voluntary meeting was signed when they were entering the meeting and it was not for the purpose of the agreement recorded to have been reached. That, the position in the referred case of **Shilehona Mamboleo** is distinguishable with the case at hand as it speaks about free consent while in our case the respondents had not consented as it was based on duress and inducement.

On the second ground her submission is that the representative of the applicant did not show how arbitrator did not consider exhibits tendered by DW2. For her, all exhibits tendered were well considered resulting to correct decision by CMA. She then prayed to the court to rely on the exhibits to uphold the CMA decision.

On the fourth ground, Ms. Kimaro submitted that, procedures were not followed and based on evidence given together with exhibits led the

commission to hold that termiation was based on operational requirement and not mutual agreement as stated by applicant.

On the last ground on lack of representative suit, she submitted that, before the matter was filed in CMA Form No. 1, all the applicants signed and appended their names and they were all attending CMA proceedings. She added that on the date of producing evidence it was agreed that Siwema Salum Shabani give testimony alone on behalf of others. For her, the award of honourable Kideha followed the procedures. she then prayed for the court to uphold the said decision.

In rejoinder, Mr. Harris submitted on the issue of attendance being signed at the entrace that the attendance was never issued as exhibit and so she should not make reference to it. Also he added that the issue of inducement or duress was not raised during hearing nor did the arbitrator raise it in his award dertermination. Duress or inducement was not used or proved to have been used in making the applicants sign termination agreements.

He continued on the 3rd ground by insisting that exhibits were no observed by the arbitrator the exhibits that were proving termiation by agreement

between the parties. And he indeed failed to analyse them properly, in his view.

On the issue that the case of Shilehona being distinguishable, he as well reiterated his submisison in chief and submitted that the case is relevant to the matter at hand as it proves that there was mutual agreemetn to end the employment relationship between the applicant and respondent. On the issue of respondents attending proceedings before CMA, he stated that it does not mean that they were really under the umbrela of representative suit as there was no adherence to the procedures to file a representative suit. Also, there was no ruling on the same allowing a representative suit to be filed. He added that the advocate for the respondents did not answer what was submitted in chief. He therefore reiterated what was submitted in chief.

Parties' submissions have been dully considered together with the records of the CMA relevant to the matter. In all, the court is called to determine two matters. One is whether the arbitrator allowed the parties to proceed with the representative that was incompetent before it and whether the respondents' termination was procedurally valid and whether it was by retrenchment or agreement.

On the first issue, Mr. Harris submitted that the arbitrator erred in allowing the then applicants at trial to file a representative suit without following procedures for filing a representative suit in terms of 29(1)(c) of Labour Institutions (Mediation and Arbitration) Rules [G.N. No. 64 of 2007] and holding in cases of **Abdallah Mohamed Msakandeo's case (supra).** So as Siwema wrongly represented others, their application was wrongly entatained by the CMA. The respondent on the other hand argued that, all the respondents appended their signature in the attached CMA Form No. 1, and they were all attending proceedings at CMA, thus, they never filed a representative suit through Siwema as argued by the applicant. It is only during testimony when Siwema testified on their behalf.

The records show that the respondent indeed appended the list of their names and signature to the application before CMA. They did not file a representative suit as insinuated by the counsel for the applicant. All the respondents as applicants at CMA signed the list of applicants appending their signatures against their names indicating they were all applicants in the matter. By doing that, no law was violated. It remain that, this suit was not heard as a representative suit. Authorising one of the applicants to do something on behalf of others by itself does not amount to have her or him

file a representative suit on behalf of the others as argued by Mr. Harris. This gound is therefore lacks merit, it is accordingly dismissed.

On the second ground whether the termination of the respondents was procedurally valid and whether it was termination by agreement or retrenchment; I will start by unveiling the distinction between the two forms of termination. Both terminations, by retrenchment and agreement are acceptable ways of terminating employment contracts in our law. In terms of Rule 3(2) (a)-(d) of GN No. 42 of 2007 termination may be by agreement, automatic termination, by the employee and by the employer. The applicant in this specific issue argued that the termination of respondents was through mutual agreement as there was written agreement to that effect, while the respondent argued that, it was retrenchment as it resulted from operational requirements.

Termination by agreement is covered under Rule 4(1) of GN No. 42 of 2007 to mean termination of a contractual relationship by the mutual consent of the parties. It is a common understanding under the law of contract that as the parties are free to enter into contracts; they are equally free to bring their contracts to an end by mutual agreement. In such cases the law puts emphasis to the genuineness of the consent of

both parties in termination (see the holding in the case of **Yara Tanzania Ltd vs Catherine Asenga** (supra).

Termination by retrenchment is provided for under rule 23(1) of the GN No. 42 of 2007 in the following words:-

> *"A termination for operational requirement (commonly known ... 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."*

The issue was whether the termination was by agreement or retrenchment. Whichever way, the respective procedure is to be followed for termination to be valid. The CMA held that the termination was by retrenchment looking on the reasons leading to the termination, as it resulted from operational requirements. This holding is highly disputed by the respondents who argued that the termination was through agreement as there were mutual contracts to terminate.

In determination as to whether termination was by retrenchment or agreement, there is a need of looking on the whole circumstances

surrounded the respondents termination, especially on the process that transpired.

What was done in this case as per records is that, on 9th April 2021 the respondents were notified about the meeting that was subsequently held on 12th April 2021 over the matter. The respondents admitted to have attended this meeting, but they dispute voluntariness of their attendance. They argued that as they were made to sign the attendance register at the entrance of the meeting room, their attendance was not free and it does not necessarily mean that they agreed to and confirmed or consented to the resolutions thereat.

The procedure to be followed in the two methods bears gread similarities save for few variations. The procedure of consultation is common to both forms of termination above. What makes a difference is if there was a mutual understanding for termination. The arbitrator decided that there was no agreement to terminate. In my view, this holding resulted from misconception as argued by Mr. Harris, since the termination was indeed by agreement. This is because, after the arbitrator found that there was a fair reason for termination which was for operational requirements as the company moved from individual to company based security guides, he

continued to conclude that, this could only result on retrenchment not termination by agreement. To him whenever such reason exists the termination is by retrenchment, something which is not true. What makes a termination by agreement differ with retrenchment is the presence of the agreement to that effect regardless of the reason leading to the agreement. So, the termination that can be by retrenchment may be terminated by agreement if mutual contract to that effect is reached. Therefore, the same reason can lead to different ways of termination depending on what is done after presence of justification. I believe that every termination has a reason, which leads to negotiations to terminate or putting procedure for retrenchment in place when it is initiated by the employer.

Thus, it is wrong to determine or identify the form of termination based on the reason for termination. The reason in such cases is in knowing intention to terminate, after which the parties choose a way to implement their intention. If they reach agreement at this point, termination will be by agreement regardless of the reason. According to exhibit D11, minutes of meeting held on 12/04/2021 parties agreed to terminate through mutual agreement provided they are paid their statutory entitlements. It was also

agreed at Page 4 of exhibit 11 that, the agreement to terminate be drafted by 13/04/2021.

On the next day, that is 13/4/2021, exhibits D12-21 were drafted reflecting what was agreed at 12/04/2021 meeting. Examining thos exhibits, it is found that they are Swahili, the language I believe, is well known by the respondents. All respondents signed the said agreements to terminate. The agreement also itemized the entitlements that were to be paid to each employee as agreed at Pg2. The fact that the agreement to terminate was signed on a different date not at the impugned meeting makes the argument by the respondent that they were made to sign at the entrance of the meeting, signifying duress, redundant. This is because, if they were tricked or forced to attend the meeting on 12/04/2021 they had a chance of not falling for it on 13/04/2021 when the agreements to terminate were signed.

Also, the claim that there was duress that was used to make applicants sign what they did not know, is unfounded, because, if at all duress ended at the meeting as correctly argued by Mr. Harris. That shows they were given time to reflect on the matter before signing. What transpired in the meeting was the information on the intention to terminate it did not go to

the extent of coercing the employees to sign the agreement to terminate. They had a chance to refuse to sign if they were dissatisfied after the meeting, complaining after receiving the payments resulting from the agreement they are disputing is to me an afterthought.

There is no complaint that the respondents were forced to sign the agreements. Signing attendance register at the entrance is for showing those who attended. Therefore, if they really perceived duress in attending a meeting they could have shown their negative thoughts by not signing the agreements that made reference to the resolutions reached in the same meeting. They even went ahead acknowledging receipt of amount of entitlements calculated based on the same agreement as reflected in exhibit D22 -31. After implementation of all what was agreed that is when the respondents decided to file a labour dispute claiming unfair termination on 07/05/2021. It follows therefore that, the exhibits signifying receipts of the payments and agreements to terminate basically remained undisputed.

From the above analysis, presence of the above undisputed exhibits shows that there was agreement to terminate and the fact that reason for termination of employment was based on operational requirements alone does not change the termination to be by retrenchment as decided by the

arbitrator. It is worth noting that, every termination has a reason, therefore stating the reason that made the parties enter into agreement to terminate as change of company security detail alone does not invalidate the otherwise valid mutual agreements to terminate between the applicant and the respondents.

I am alive to the fact that in the circumstances of this case where termination is by agreement that is initiated by the employer by notifying the employees to let them know his initiatives, courts are warned to be cautious in determining the genuineness of employees consent. In the case of **McAlwane V. Boughton Estates Limited [19731 2 All ER 299 it was held that:-**

> *"An agreement to terminate an employment contract, if the initiatives arise from the employer, must be interrogated to confirm whether the employee freely consented to the termination. Hence, the court would not approve an agreement to terminate employment unless it is proved that the employee really did agree with full knowledge of the implications it had for him."*

The above caution is aimed at ensuring that termination is made freely without duress or inducements impairing the employees understanding of the whole implication of the process. And from the circumstances of this

case, I am satisfied that the consent was free for the reasons explained above.

The third ground is thus found to have merits; the arbitrator indeed misconceived the facts by holding that the termination based on operational requirement is always a retrenchment ignoring the agreement entered into that changed the mode of termination to termination by agreement. Had he directed his mind correctly, he could not have found that procedure for termination was not followed. It is that misconception that made him consider procedure in termination by retrenchment rather than procedure in mutual agreement termination. This justifies the applicants fourth ground as well as correctly submitted by Mr. Harris.

Generally, upon finding that the mode of termination was by agreement, it is worth noting that in the circumstances parties are bound by the agreed terms of the contract, and courts are prohibited from interfering with the same unless it was made out of duress or influence. And in this case I decline to exercise the power this court do not have after unveiling the agreement between the applicant and the respondent. In the case of **Univeler Tanzania Ltd v. Benedict Mkasa t/a Bema Enterprises, Civil is Appeal No. 41 of 2009** (unreported) in which the court relied in

the persuasive decision of the Supreme Court of Nigeria in **Osun State Government v. Daiami Nigeria Limited, Sc. 277/2002** it was articulated that:

> *'Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves. It was up to the parties concerned to renegotiate and to freely rectify clauses which parties find to be onerous. It is not the role of the courts to redraft clauses in agreements but to enforce those clauses where parties are in dispute.'*

As the respondents signed the agreements out of their free will, there was no need of the arbitrator disregarding the agreements which he received as exhibits. I am content that the applicant proved with sufficient evidence that the termination was by agreement.

It is therefore my considered view that, the procedure in termination by agreement was followed to the letter by the applicants in terminating the respondents' contracts of employment. The arbitrator's misconception resulting from ignoring the exhibits that showed the agreements to terminate between the parties is what led him to hold that procedure was not followed. Manifestly, he concentrated in examining compliance with

procedure for a different mode of termination rather than termination by agreement. For that, the arbitrator indeed erred as argued in deciding that the contract was terminated by retrenchment and not agreement. This is because; he failed to give regard to Exhibit 11, 12 -22 which confirmed termination by agreement.

Having said so, the application is allowed. The CMA award is quashed and set aside. No order as to cost, this being a labour matter.

M. P. OPIYO,

JUDGE

12/6/2023