IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 138 OF 2023

(Arising from an award issued on 10/03/2023 by Hon. Msina, H. H., Arbitrator, in Labour dispute No. CMA/DSM/ILA/645/2020/299 at Ilala)

ATHUMAN ISMAIL ..... 1ST APPLICANT
PROTASE PROJESTUS ..... 2ND APPLICANT
BARAKA THOMAS LWILA ..... 3RD APPLICANT
JOHN ANDERSON MUNISI ..... 4TH APPLICANT
AARON GABRIEL HABASH ..... 5TH APPLICANT

VERSUS

PIL (TANZANIA) LIMITED ..... RESPONDENT

JUDGMENT

Date of last Order: 20/07/2023
Date of Judgment: 23/08/2023

B. E. K. Mganga, J.

Athuman Ismail, Protace Projestus, Baraka Thomas Lwila, John Anderson Munisi and Aaron Gabriel Habash, the abovenamed applicants were employees of PIL(Tanzania) Limited, the abovenamed respondent. It is undisputed that on 14th July 2020, respondent terminated employment of the applicants, allegedly, due to operational

requirements. Applicants were aggrieved with the said termination, as a result, on 6th August 2020, they filed Labour dispute No. CMA/DSM/ILA/645/2020/299 before the Commission for Mediation and Arbitration henceforth CMA at Ilala complaining that respondent terminated their employment unfairly. In the Referral Form (CMA F1), on fairness of reason, applicants indicated that respondent had no valid reason for retrenchment and that the reason given was not sufficient. On fairness of procedure, applicants indicated that (i) the exercise was selective and discriminatory, (ii) no proper consultation was done, (iii) selection criteria were not adhered to, (iv) no reasons were given for departing from retrenchment procedures and (v) no steps taken to avoid retrenchment. Based on the foregoing, applicants indicated that, each applicant was claiming to be paid (i) 24 months' salary compensation, (ii) salary for the remaining period and (iii) TZS 10,000,000/= being general damages.

On 10th March 2023, Hon. Msina, H. H, Arbitrator, having heard evidence of both sides, issued an award that termination was fair and dismissed the dispute filed by the applicants. In dismissing the dispute, the arbitrator held *inter-alia* that, respondent was not supposed to comply with each sub-section of section 38 of the Employment and Labour Relation Act [Cap. 366 R.E. 2019] in a checklist fashion.

Applicants were aggrieved with the said award, hence, this application for revision. In their joint affidavit in support of the notice of application, applicants raised Eight (8) issues namely: -

1. *Whether the arbitrator was justified to hold that during retrenchment exercise, respondent was not required to abide by the mandatory requirement of section 38 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019].*
2. *Whether the arbitrator properly held that there was an agreement for retrenchment that was executed by the parties prior to retrenchment.*
3. *Whether it was proved that consultation was made.*
4. *Whether respondent proved that she was facing economic difficulties to justify retrenchment of the applicants.*
5. *Whether it was proper for the arbitrator to ignore evidence of the applicants who prove that respondent was a going concern and did not incur loss.*
6. *Whether it was proper for the arbitrator to hold that applicants were represented during retrenchment exercise.*
7. *Whether there were selection criteria for purposes of retrenchment*
8. *Whether it was proper for the arbitrator not to award reliefs contained in the CMA F1.*

Respondent resisted the application by filing the Notice of Opposition and the Counter affidavit sworn by Elizabeth Joachim her principal officer.

When the application was called on for hearing, Mr. Sylivatus Mayenga, Advocate appeared and argued for and on behalf of the applicants while Mr. Steven Jamson Shitindi, Advocate, appeared and argued for and on behalf of the respondent.

Arguing the 1st issue in support of the application, Mr. Mayenga, learned counsel for the applicants submitted that, Section 38 of Cap. 366 R.E. 2019(supra) is mandatory and there is no any laxation. Counsel for the applicants further submitted that, Section 38(1)(b) of Cap. 366 RE. 2019 (supra) requires disclosure of all relevant information relating to the intended retrenchment. He went on that, reason for retrenchment was economic loss and that, respondent tendered the annual report (exhibit D1) to that effect. Learned counsel for the applicants submitted that, neither DW1 nor DW2 testify that exhibit D1 was tabled for discussion during consultative meeting for retrenchment as part of disclosure of relevant information required under section 38(1)(b) of Cap. 366 R.E. 2019 (supra). He submitted further that, in his evidence, DW2 admitted that minutes of the said meeting does not show that annual report was discussed. Mr. Mayenga concluded that, it was an error on part of the arbitrator to hold that all relevant information were disclosed.

Arguing the 2nd issue, learned counsel for the applicants submitted that, retrenchment agreement (exhibit D5), was only signed by the respondent and not by the applicants. He submitted further that, failure of the applicants to sign exhibit D5 implies that applicants did not agree with the terms of the agreement. Learned counsel added that, DW2

admitted that exhibit D5 was only signed by Elizabeth Joachim and Rasmus Berman, all being for the respondent.

Arguing the 3rd issue, Mr. Mayenga, submitted that, there was no consultation that was done to justify retrenchment. Learned counsel for the applicants submitted further that, in their evidence, both DW1 and DW2, admitted that there was no consultation. Learned counsel concluded that, since there is admission by the respondent that consultation was not done and there is no document that was tendered to prove that consultation was done, the court should revise the award.

Arguing the 4th and 5th issues, Mr. Mayenga, learned counsel for the applicants submitted that, exhibits P16 and P17 shows increase of import and export business of the respondent between 2018 and 2020. He submitted further that, applicants were terminated in 2020. Learned counsel strongly submitted that, the findings of the arbitrator that respondent was facing economic difficulties is not reflected in evidence of the respondent. Counsel for the applicants submitted further that, in his evidence, DW1 was unable to prove existence of economic loss or difficult of the respondent. Mr. Mayenga added that, exhibits P3, P6, P8, P10, P11 and P15 that were tendered by the applicants shows that, at the material period, salary of the applicants was increased to show that

respondent was not in economic difficult. He added that, in his evidence, PW1 testified that there was increase of vessels for import and export.

Arguing in support of the 6th issue, counsel for the applicants submitted that, DW2 admitted that during retrenchment exercise, applicants were not duly represented by a member from a Trade Union or a person of their own choice. Counsel added that, according to the minutes of the meeting (exhibit D4), Mr. Damian Mosha (DW1), and DW2 were representing the respondent. He went on that, Mr. Damian Mosha (DW1) admitted in his evidence that, during retrenchment exercise, he was representing the respondent. Learned counsel for the applicants concluded that, during retrenchment exercise, applicants were unrepresented.

Arguing in support of the 7th issue, learned counsel for the applicants submitted that, there was no selection criteria. He submitted further that, applicants only became aware that they have been selected for retrenchment after being issued with termination letters. Mr. Mayenga submitted further that, in exhibit D4, respondent indicated that she considered (i) performance (ii) skills and (iii) experience but both DW1 and DW2, did not testify how these criteria were applied to the applicants. Learned counsel submitted that, increase of salary of the applicants (exhibit AP3 to AP15) is a proof that applicants were

performing better. He added that, some of the applicants had worked with the respondent for five or three years and no evidence was tendered to show that they had earlier on, performed poor.

Arguing in support of the 8th issue, Mr. Mayenga submitted that, applicants were entitled to be awarded what they prayed in the CMA F1. Learned counsel concluded that, the application is merited and prayed the court to allow it, quash and set aside the CMA award and order respondent to payapplicants according to their prayer in the CMA F1.

Resisting the application, Mr. Shitindi, learned advocate for the respondent submitted on the 1st and 2nd issues that, nowhere in the award the arbitrator held that it is not mandatory to comply with the provision of Section 38 of Cap. 366 R.E. 2019(supra). Counsel submitted further that, the arbitrator held that Section 38 of Cap. 366 R.E. 2019(supra) cannot be used in a checklist fashion. He added that, the arbitrator held that, retrenchment process should be done in good faith and that, important matters provided under Section 38 of Cap. 366 R.E. 2019(supra) should be complied with. He went on that, one of the mandatory requirements is notice of retrenchment so that parties can agree on retrenchment and that, the requirement of notice was compiled by the respondent through exhibit D1.

Counsel for the applicants submitted further that, after being served with the notice, applicants appeared in the consultation meeting (exhibit D4) and that, applicants were afforded right to be heard and each one expressed his views. Counsel submitted that, DW2 testified that, applicants attended the meeting and that, all necessary information relating to economic difficulty of the respondent were tabled. He added that, in the minutes and at CMA, applicants did not state what they proposed or what was their demand. Counsel submitted further that, applicants were supposed to give their opinions in good faith and that, there is no evidence to show that they were forced to agree what was tabled by the respondent.

Mr. Shitindi strongly submitted that, applicants signed retrenchment agreement (exhibit D5) to show that they agreed or consented to the retrenchment. He submitted further that at CMA, applicants were disputing their signatures but did not prove that those were not their signatures. He went on that, applicants had a duty, under section 110 of the Evidence Act Cap. 6 R.E. 2019, to prove that those were not their signatures. Learned counsel for the respondent submitted further that, at CMA, only Athuman Ismail testified as PW1 on behalf of other applicants and that, other applicants did not appear to dispute those signatures.

Responding to submissions made by counsel for the applicants in respects of the 3rd issue, Mr. Shitindi, submitted that, there was consultation and parties agreed to termination. He added that, it is not true that DW2 admitted that there was no consultation.

Regarding the 4th and 5th issues, counsel for the respondent submitted that, there is no evidence to prove that respondent was performing well economically. Counsel submitted further that, PW1 admitted that exhibit AP16 and P17 were electronic and were not signed by the respondent. He added that, it is unknown as to where PW1 obtained these exhibits. Learned counsel further submitted that, it is not true that respondent's export and import increased in 2018 and 2020. He strongly submitted that, respondent was facing economic difficulties as it was discussed in the consultation meeting and that, mere increase of export and import does not mean that respondent was getting profit. He added that, increase of salary does not mean that respondent was performing well economically.

Regarding the 6th issue, learned counsel for the respondent submitted that, it was not amongst the dispute at CMA that applicants were not represented. He submitted further that; applicants did not testify on how they were affected for not to be represented. He added

that, applicants did not testify that they prayed to be represented but respondent refused.

Responding to the 7th issue, learned counsel submitted that, this is new issue. He submitted further that, at CMA, applicants did not raise the issue of selection. He added that, applicants did not indicate in CMA F1 that selection criteria were an issue.

Regarding the 8th issue, Mr. Shitindi, learned counsel for the respondent submitted that, the dispute was properly decided, and that, arbitrator was justifiable not to award applicants. He submitted further that, applicants were paid by the respondent as agreed in the retrenchment agreement and referred the court to exhibit D7 and D8 to show how each applicant was paid. To support his submissions, learned counsel cited the case of ***Tujijenge Tanzania Limited v. Thomas Somme***, Revision No. 654 of 2019. Learned counsel concluded his submissions by praying the application be dismissed for want of merit.

In rejoinder, Mr. Mayenga reiterated that, there was no disclosure of important material for retrenchment. Counsel for the applicants submitted that, minutes of the retrenchment meeting (exhibit D4) and retrenchment agreement (exhibit D5) were only signed by the respondent. He went on that, there is no signatures of the applicants.

He added that, in their evidence applicants did not dispute the signatures because, those exhibits were signed by the respondent only. He reiterated that; no consultation was properly done. He went on that, there is no evidence to contradict exhibit AP16 and AP17 and that, salary increment was linked with applicant's performance and respondent's economic performance. He strongly submitted that; respondent did not inform applicants that they have right to be represented.

I have carefully examined evidence in the CMA record and submissions made by the parties in this application. It was submitted on behalf of the applicants that respondent did not prove reasons for retrenchment. It was evidence of Elizabeth Mimbi Joachim (DW2) that respondent terminated employment of the applicants due to operational requirements. DW2 testified further that in 2019 TASAC changed laws barring agencies in Tanzania to receive 25 % delivery order fee and that, in 2020 during Covid 19 pandemic, China did not do business for 3 months consecutive, as a result, respondent incurred loss of income. DW2 tendered financial statement for 2019 (exhibit D1) and testified that, there was a decline of business from 4.3 billion in 2018 to 3.7 billion to 2019 before paying tax and that, after tax, it was 1.6 billion

and 900 million for the year 2018 and 2019 respectively. It was further evidence of DW2 based on exhibit D2 that, respondent incurred loss from January to June 2020.

In discrediting evidence of the respondent specifically evidence of DW2, Athuman Ismail Buko (PW1), the only witness who testified on behalf of the applicants, tendered agent operation cost (exhibit AP16) and statistics on import and export of cargo (exhibit AP17) to show that during the period in question, respondent paid bonus and that there was increase of vessels hence respondent made profit.

I should point out that, respondent objected both exhibits AP16 and AP17 to be admitted as evidence on reason that it is unknown as to where applicants obtained those documents because they have nothing to do with the respondent and further that those documents were not from respondent's computer. I have carefully read evidence of PW1 and find that he did not testify as to whether, he is the one who printed those exhibits from the computers of the respondent, or, that, he obtained them from the respondent. More so, exhibit AP16 also bears the name of Ledger Hotels & Resort. Unfortunately, in his evidence, 1st applicant (PW1), did not testify how the said name (Ledger Hotels & Resort) is related to the respondent. In my view, applicants did not lay

foundation for exhibits to be admitted and considered by the arbitrator in the award. It is my view further that, exhibits AP16 and AP17 were not worth to be considered. That being the position, it is my considered opinion that evidence of DW2 in relation to economic condition of the respondent was not shaken.

In addition to the fore going, minutes of the meeting on retrenchment (exhibit D4) that was admitted without objection, the reason for retrenchment is stated. In his evidence, 1st applicant (PW1) who testified on behalf of the applicants did not discredit exhibit D4. In fact, exhibit D4 on reason for retrenchment reads: -

> *"i. The GM informed the employees on the reason for retrenchment being company's financial performance, the effect is a result of banning of delivery order fee from May 2019 and the outbreak of COVID 19 on (sic) 2020. Where the company's revenue was affected from 2019 to 2020 and low volume of vessels resulted to loss for 3 months consecutively from March to May 2020, despite the management's efforts to minimize all operating costs."*

The above reason for retrenchment was not countered by strong evidence by the applicants. I therefore find that respondent had a valid reason for retrenching the applicants. In short, I decide the 4th and 5th issues in favour of the respondent.

It was submitted by counsel for the applicants that, neither DW1 nor DW2 testified that the annual report (exhibit D1) was tabled for discussion in a meeting for retrenchment as part of disclosure of relevant information required under section 38(1)(b) of Cap. 366 R.E. 2019 (supra). With due respect to counsel for the applicants, that is not the requirement of the law. It is my view that, section 38(1)(b) of Cap. 366 R.E. 2019(supra) that requires the employer to disclose relevant information does not mandatorily, require the employer to table annual financial report(s) to her employees for discussion to prove that the employer is in economic difficulty. Since that is not a requirement of law, I find that, arguments by counsel for the applicants in relation to failure to table annual report for discussion in a consultative meeting, lacks merits.

In the award, the arbitrator held that respondent was not supposed to comply with each sub-section of section 38 of Cap. 366 R.E. 2019(supra) in a checklist fashion. In short, it was a view of the arbitrator that compliance with some of the sub-sections of section 38 of Cap. 366 R.E. 2019(supra) was sufficient. With due respect to the arbitrator, that is not the correct position of the law. It is my view that, in retrenchment, employer must comply with all provisions of section 38

of Cap. 366 R.E. 2019(supra). The employer cannot choose which subsection to comply with and leave others. In fact, had it that the legislature intended to give option to the employer to choose which subsection of section 38 of Cap. 366 R.E. 2019(supra) to comply with, it could have stated so clearly in unambiguous terms. It is my view that, section 38 of Cap. 366 R.E. 2019(supra) should be interpreted in its plain meaning. The arbitrator wrongly did not give proper interpretation and scope of the said section. I, therefore. decide the 1st issue in favour of the applicants.

It was submitted by counsel for the applicants that applicants did not sign retrenchment agreement (exhibit D5) and that, failure of the applicants to sign exhibit D5 implies that applicants did not agree with the terms of the agreement. I have examined evidence of DW2 and find that when he was testifying under re-examination, DW2 stated that she signed exhibit D5 on behalf of the respondent and that, each applicant signed the said exhibit. I have carefully examined the said retrenchment agreement (exhibit D5) and I entirely agree with evidence of DW2 that they signed retrenchment agreement (exhibit D5). The said exhibit D5 shows that it was signed by Ms. Elizabeth Joachim (DW2) the Finance and Admin Manager and Mr. Rasmus Bermann Teilmann, the General

Manager of the respondent as reflected at page 2 of 5 of exhibit D5 on one hand, and Athuman Buke, 1st applicant(PW1), Protace Projestus, the 2nd applicant, Baraka Lwila, the 3rd respondents as reflected at page 3 of 5 of exhibit D5, John A. Munisi and Aaron G. Habash, the 4th and 5th applicants respectively as reflected at page 4 of 5 of exhibit D5. In his evidence, 1st applicant (PW1) testified that applicants did not enter into agreement with the respondent. In my view, evidence of the applicants and submissions that exhibit D5 was not signed by the applicants lacks merit. I am of that conclusion because exhibit D5 shows clearly that it was signed by the applicants. More so, no evidence was adduced by the applicants to prove that signatures appearing on exhibit D5 does not belong to them. In terms of the provisions of section 110 of the Evidence Act Cap. 6 R.E. 2019, applicants were under duty to prove that signatures appearing on exhibit D5 were not signed by them, but they did not discharge that duty. It was not enough 1st applicant (PW1) just to state that in his evidence that applicants did not sign exhibit D5 without tendering evidence to prove that signatures on exhibit D5 does not belong to them. In absence of evidence to contradict evidence of DW2 and exhibit D5, I hold that the said retrenchment agreement was signed by all applicants.

In the said retrenchment agreement (exhibit D5) the parties agreed in clause 9 as follows: -

> *"9. That all the retrenched employees shall be entitled to benefits stipulated below*
>
> *i. Salary for the days worked up to the end of 31st July 2020.*
>
> *ii. One-month basic salary in lieu of notice.*
>
> *iii. Leave pay if any and not taken.*
>
> *iv. Severance pay of seven days basic wage for any completed year to the maximum of ten years.*
>
> *v. Certificate of service."*

In clause 10, it was stated that each retrenched employee will accept the management decision as final in the respect of retrenchment and will co-operate in complete handover of their work and company properties to the person designated by the management.

I have examined exhibit D8 relating to payments that were done by the respondent to the applicants after retrenchment and I am of the considered view that, applicants were duly paid according to the retrenchment agreement (exhibit D5). Exhibit D8 shows that (i) on 16th July 2020, Athuman Ismail, 1st applicant was paid TZS 3,078,904/20 in his bank account No. 0151038840 maintained at ABSA bank, (ii) on 28th July 2020, Protace Projestus, 2nd respondent was paid TZS 4,333,570/14 in his bank account No. 0151054005 maintained at ABSA bank at Ohio branch, (iii) on 15th July 2020, Baraka Thomas Lwila, the 3rd applicant

was paid TZS 2,636,058/86 in his bank account No. 0151045456 maintained at ABSA bank, Ohio branch, (iv) on 16th July 2020, John Anderson Munisi, the 4th applicant was paid TZS 2,851,491/27 in his bank account No. 0011063853 maintained at ABSA bank, Ohio branch and (v) on 16th July 2020, Aron Gabriel Habash, the 5th applicant was paid TZS 5,183,895/15 in his bank account No. 0151042260 maintained at ABSA bank, Ohio branch. In addition to the said payments, applicants were issued with certificates of service as evidenced by exhibit D7.

I should point out that exhibits D5, D7 and D8 were tendered without objection. In fact, in his evidence, 1st applicant (PW1), the only witness for the applicant said nothing in relation to payment that was done to them by the respondent through exhibit D8. It is therefore my view that, there is no dispute that applicants were paid their retrenchment as agreed in exhibit D5. It is also undisputed that applicants filed the dispute at CMA on 6th August 2020 after they have received payment from the respondent as indicated in exhibit D8. It is my view that, after receiving the said payments, applicants were precluded to deny what they agreed in the retrenchment package (exhibit D5), and they were not supposed to file the dispute at CMA challenging what they agreed. In short, applicants were estopped to

challenge fairness of termination of their employment. After signing exhibit D5 and receive payment as explained hereinabove, the doctrine of estoppel operated against them. I am guided by the decisions of the Court of Appeal in the case of ***Denis s/o Magabe vs Republic***, Criminal Appeal No. 7 of 2010 [2011]TZCA 45, ***Bytrade Tanzania Limited vs Assenga Agrovet Company Limited & Another***, Civil Appeal No. 64 of 2018 [2022]TZCA 619, ***Trade Union Congress of Tanzania (TUCTA) vs Engineering Systems Consultants Ltd & Others***, Civil Appeal No.51 of 2016 [2020] TZCA 251, ***Muhimbili National Hospital vs Linus Leonce*** (Civil Appeal 190 of 2018) [2022] TZCA 223, ***Hadija Issa Arerary vs Tanzania Postal Bank*** (Civil Appeal 135 of 2017) [2020] TZCA 217 to mention but a few on the application of doctrine of estoppel.

In the ***TUCTA's case*** (supra), the Court of Appeal quoted an Article by Shreya Dave titled "the Doctrine of promissory estoppel" wherein the author wrote:-

> *"The true principle of promissory estoppel is where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact acted upon by the other party the promise would be binding on the party making it and he would not be entitled to go back upon it.*"

As pointed hereinabove, applicants received payment from the respondent as retrenchment package prior to filing the dispute at CMA. It is my view that, if applicants were aggrieved with the whole process of retrenchment, they were, in terms of section 38(2) of Cap. 366 R.E. 2019(supra), supposed to refer the dispute at CMA before receiving retrenchment payments. In my view, they cannot receive the money as retrenchment package and thereafter refer the dispute to challenge fairness of termination of their employment. I therefore find that the application is unmerited.

It was submitted by counsel for the applicants that applicants were not consulted, were not represented in the meeting, there was no selection criteria etc. It is my view that these issues were supposed to be raised at CMA had the applicants complied with the provisions of section 38(2) of Cap. 366 R.E. 2019(supra) by filing the dispute prior receiving retrenchment package. In my view, as pointed hereinabove, after receiving retrenchment package, applicants were barred to challenge fairness of termination of their employment. I should point out albeit briefly that, in his evidence, 1st applicant (PW1) on behalf of the applicants did not testify that applicants were members of a trade union to justify their complaint that respondent violated the law for failure to

allow a trade union to attend. More so, answers to the issues raised by the applicants are found in exhibit D4 that was admitted without objection and there is no evidence to contradict it.

For all that I have discussed hereinabove, I dismiss this application for lack of merit.

Dated at Dar es Salaam on this 23rd August 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on 23rd August 2023 in chambers in the presence of Rosalia Ntiruhungwa, Advocate for the Applicant but in the absence of the Respondent.

B. E. K. Mganga
JUDGE