IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

LABOUR REVISION NO. 150 OF 2023

BETWEEN

FREIGHT IN TIME (T) LTD ..... APPLICANT

VERSUS

SHITA MOHAMEDY KANUKA ..... RESPONDENT

JUDGEMENT

Date of last Order: *31/08/2023*
Date of Judgement: *20/09/2023*

MLYAMBINA, J.

In the instant matter the Applicant urges the Court to intervene the Award of the Commission for Mediation and Arbitration (herein CMA). He alleges that there were some illegalities involved in the impugned Award and that the CMA exceeded its powers vested by the law.

The application proceeded by way of written submissions. The Applicant was represented by Hassan Yassin, Learned Counsel whereas Mr. Benson Mphatso, learned Counsel appeared for the Respondent.

The brief background of the dispute is that the Respondent was employed by the Applicant as an Administration Assistant since 7th June, 2010. She was promoted to various positions up to the position of

Supervisor. However, the Respondent was retrenched from employment on 30th November, 2021. Aggrieved by the termination, she referred the matter to the CMA. After considering the evidence of the parties the CMA found that the Respondent was unfairly retrenched from employment. Therefore, she was awarded a total of TZS 22,698,130/= being, twelve months salaries as compensation for the alleged unfair termination, one month salary in lieu of notice and severance pay. Being unhappy with the CMA's decision, the Applicant filed the present application.

Arguing in support of the application, Mr. Yassin submitted that the Award was improperly procured because the Arbitrator failed to properly analyse the evidence on record. Poor analysis was in respect of the Applicant's testimony on the financial constraints which were caused by various reasons including but not limited to the eruption of COVID – 19 which affected the business of the Applicant as a courier and clearing and forwarding services done during the time of eruption of the disease. Mr. Yassin insisted that the business was down and the same was proved by the financial statement of profit and loss from the year 2018 to 2020.

Mr. Yassin went on to submit that the financial report submitted was part and parcel of the main audited report, the fact which was not

considered by the Arbitrator. As regards the reason for retrenchment, he submitted that the same was based on the economic needs of the business in terms of *Rule 23(2)(a) of the Employment and Labour Relations [Code of Good Practice] Rules, GN. No. 42 of 2007.* He added that the need to have few employees who will be able to replace the task of several departments to reduce the cost of production was tested by the Applicant by sending the Respondent and other employees on leave.

It was further contended that the Arbitrator wrongly accepted the allegation that the Applicant employed new employees during the time of the financial crisis without proof of the same. Further, it was submitted that the Applicant followed retrenchment procedures as provided under *Section 38 of the Employment and Labour Relations Act, [Cap 366 Revised Edition 2019]* (herein ELRA). He stated that the Applicant consulted the retrenched employees, and the minutes thereto were tendered at the CMA.

Mr. Yasin went on to argue that the trial Arbitrator acted beyond the powers granted under *Section 14 and 15 of the Labour Institutions Act [Cap 300 Revised Edition 2019] (herein LIA*). He was of the view that the power to interpret the law is exclusively given to the labour

Court as per *Section 94 of the ELRA*. He said, the CMA wrongly interpreted that the tendered financial report did not comply with *Section 30A of the Accountants and Auditors (Registration Amendment) Act No. 7 of 2021 (herein Act No. 7 of 2021)*.

In the upshot, Mr. Yassin insisted that in the matter at hand the Applicant had reasonable ground to retrench the Respondent and he followed the required procedures stipulated by the law. Therefore, the Arbitrator's decision is contrary with the evidence available in record. He thus, urged the Court to fault the CMA's decision.

In response to the application, Mr. Mphatso submitted that the Applicant failed to pursue the Arbitrator that there was a substantive reason to terminate the Respondent. He stated that in the list of documents to be relied upon at the CMA, the Applicant listed Financial Auditing Report of the company but ended up tendering a statement of profit and loss which was admitted as exhibit D6. He stated that; if this Court intends to use such document, it is like the Respondent is adjudged on the evidence which was not properly admitted in evidence. To bolster up his submission, he referred the Court to the cases of **Shemsa Khalifa & 2 Others v. Suleiman Hamed Abdallah,** Civil Appeal No. 82 of 2012 (unreported); **Godbless Jonathan Lema v.**

Mussa Hamis Mkanga & 2 Others, Civil Appeal No. 47 of 2012 (unreported) and the case of **Mhubiri Rogega Mong'ateko v. Mak Medics Ltd**, Civil Appeal No. 106 of 2019 (unreported). He insisted that exhibit D6 was incomplete to be referred as the financial statement.

Mr. Mphatso went on to submit that the Arbitrator properly analysed the evidence on record. He stated that the Applicant failed to comply with the requirement enunciated at *Section 38(1) of the ELRA and Rule 23 of GN. No. 42 of 2007.* He submitted that; in this case, the employer and employees did not agree on the criteria for the selection of employees to be retrenched. He added that; only two employees out of 23 were retrenched without any justification. Thus, in this case, the Applicant failed to conclude the whole process of consultation.

It was further argued by Mr. Mphatso that retrenchment procedures are not meant to be adhered in a checklist fashion, the position held in numerous decisions including the case of **Security Group (T) Ltd v. Samson Yakobo and 10 Others**, Revision No. 171 of 2011, High Court Labour Division at Dar es Salaam (unreported).

On the allegation that the Arbitrator acted *ultra vires*, it was submitted that the CMA powers are provided under *Section 15 and 20 of LIA*. He argued that on the basis of *Section 88(4) of ELRA* the Arbitrator

had jurisdiction to interpret the law hence arriving at a proper decision. He therefore urged the Court to dismiss the application and upheld the CMA's Award.

Having gone through parties' submissions, Labour laws, CMA and Court records with eyes of caution, I find the issues for determination are; *firstly, whether the Applicant had a valid reason to retrench the Respondent. Secondly, whether the retrenchment procedures were followed; and, thirdly, to what reliefs are the parties entitled to.*

To start with the first issue; in our labour laws, retrenchment is also known as termination on operational requirement. It is one of the ways of ending employment contracts recognized in our Labour laws. The term operational requirement is defined under section 4 of the Act which is to the effect that:

> Requirement based on the economic, technological, structural or similar needs of the employer.

The circumstances under which retrenchment exercise may take place are provided under *Rule 23 of GN. No. 42 of 2007* which is to the effect that:

> (1) A termination for operational requirements (commonly known as retrenchment) means a termination of employment arising from the 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;

(c) *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.

[Emphasis is mine]

The Applicant maintained that the retrenchment in this case was necessitated by the economic needs of the business. That the company has been operating under loss from the year 2018, 2019 and 2020 as it is evidenced by the statement of profit and loss (exhibit D6). It was the Arbitrator's finding that exhibit D6 was incomplete contrary to *Section 30A (1) of Act No. 7 of 2021.* It was his view that the financial report should have been companied with balance sheet, income statement, cashflow statement and equity statement by shareholders. In deciding

as to whether termination on the ground of retrenchment is fair, the Court in the case of **Bakari Athuman Mtandika v. Superdoll Trailler Ltd,** Revision No. 171 of 2013, High Court Labour Division Dar es Salaam (unreported) held that:

> The basic duty of decision maker in unfair termination dispute, where operational reasons are raised as a cause for terminating an employee...among issues to be framed should be whether or not operational grounds were genuine reason justifying termination or a pretext.

It should first be noted that the burden of proving that the termination was fair lies to the employer. The standard of proof is on the balance of probabilities as it is provided under *Rule 9(3) of GN. No. 42 of 2007* which is to the effect that:

> The burden of proof lies with the employer but it is sufficient for the employer to prove the reason on a balance of probabilities

In the matter at hand, after critically examining the record, it is my view that the Applicant proved the reason for retrenchment on the following reasons: *First*, before resorting to retrenchment the Applicant sent some of the employees including the Respondent into a compulsory leave with a view of observing if their duties could be performed by the

remaining employees. Thereafter he proceeded with the retrenchment exercise.

Second, the Applicant tendered the statement of profit and loss (exhibit D6) to prove that the company was operating under loss. Exhibit D6 shows briefly the income and loss of the company from the year 2018 to 2020. Thus, the Arbitrator should have considered such evidence. I don't agree with the Arbitrator's finding that exhibit in question was incomplete contrary to *Section 30A (1) of Act No. 7 of 2021.* The referred law is specifically enacted to regulate accountants and auditors. It has no any relation to labour matter. Additionally, the law empowers the Arbitrator to conduct Arbitration with minimal legal formalities. This is provided for under *Section 88(4)(a) of the ELRA (supra) which states.*

> The Arbitrator
>
> (a) shall deal with the substantial merits of the dispute with the minimal legal formalities.

Therefore, in line with *Section 88(4)(a) of the ELRA (supra)*, it was wrong for the Arbitrator to demand balance sheet, income statement, cashflow statement and equity statement by shareholders from the Applicant. Exhibit D6 was sufficient by itself to prove profit and loss of

the Applicant. I have noted the Applicant's allegation that the Arbitrator acted *ultra vires* in interpreting the provision of *Section 30A (1)* (supra). It is my view that when deciding disputes Arbitrators do interpret the law. Therefore, Arbitrators are vested with such power by virtue of being a quasi-judicial body to resolve employment disputes. As such, the allegation that the Arbitrator acted *ultra vires* lacks merits.

Third, during consultation meeting the reason for retrenchment was explained to the employees. They were informed that the reason for the loss of the business was due to the drop of World economy dues to Covid 19, changes of government policies i.e introduction of GPSA & TASAC which took most of their big clients in shipment and loss other clients due to inefficiency. This is reflected at page 2 of the consultation minutes (exhibit D2).

Therefore, on the basis of the foregoing analysis, it is my finding that the Applicant proved the reason for retrenchment on the balance of probabilities. The evidence available in record is sufficient to prove such fact.

On the second issue, as to procedures for retrenchment, the same are provided for under *Section 38 of ERLA (supra).* For easy of reference, *Section 38 (supra)* provides:

> (1) In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, be 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,
> [Emphasis is mine]

The above stipulated procedures and principles are mandatory and have to be adhered by any employer on retrenchment though not in a checklist fashion as it is the Court's position in numerous decisions including the case of **Security Group (T) Ltd** (supra). The section is *in pari materia* with *Rule 23 – 24 of GN. No. 42 of 2007.* In the instant matter, it is my view that the stipulated procedures were followed by the Applicant in retrenching the Respondent.

The Applicant issued a retrenchment notice on 12/11/2021 (exhibit D1) inviting all staffs to attend a consultation meeting. The consultation meeting was held on 16/11/2021 as evidenced by the minutes (exhibit D2). Even the criteria for selection were discussed in the meeting in question. The benefits for the affected employees were also discussed in the meeting in question. Under such circumstance, I find the procedures for retrenchment to have been adhered.

I have noted the Respondent's testimony at the CMA that they did not come with the conclusion in the consultation meeting. That they agreed to convene further consultation meeting after the outcome from the management. Such testimony is not reflected in the consultation minutes which were not disputed at the CMA.

In the result, I find the present application has merit. The Applicant had valid reason to retrench the Respondent and it adhered to the procedures thereto. Thus, the CMA's Award is hereby quashed and set aside.

It is so ordered.

Y.J. MLYAMBINA

JUDGE

20/09/2023

Judgement pronounced and dated 20th September, 2023 in the absence of both parties.

Y.J. MLYAMBINA

JUDGE

20/09/2023