IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 241 OF 2023

(Arising from an Award issued on 03/08/2023 by Hon. Wilbard, G.M, Arbitrator, in Labour dispute NO. CMA/DSM/ILA/817/19/52/2020 at Ilala)

ABUBAKARI RASHID SHEKIFU & 4 OTHERS..... APPLICANTS

VERSUS

NAS DAR AIRCO COMPANY LTD ..... RESPONDENT

JUDGMENT

Date of last Order: 26/2/2024
Date of Judgment: 4/3/2024

B. E. K. Mganga, J.

Facts of this application are that, Abubakary Rashid Shekifu, Samwel P. Haule, Neema Lucas Londo, Hamimu Yunus Nindi and Mohmaed Gharibu Shabaani, the 1st, 2nd, 3rd, 4th, and 5th applicants respectively, were employees of the respondent. On 22nd August 2019, respondent served the applicant with the notice of intended retrenchment. On 6th September 2019, Abubakary Rashid Shekifu, Neema Lucas Londo, 1st, and 3rd, applicants were served with termination letter showing that their employment will be terminated on 30th September 2019. Paul Haule, and Mohamed Gharibu Shabaani, the 2nd and 5th applicants respectively, were served with termination letter

on 11th September 2019 while Hamimu Yunus, the 4th applicant was served with termination letter on 3rd September 2019 showing that termination will be effective on 30th September 2019.

Aggrieved with termination of their employment, on 23rd October 2019, applicants filed Labour dispute No. CMA/DSM/ILA/817/19/52/2020 before the Commission for Mediation and Arbitration at Ilala complaining that respondent terminated their employment unfairly. In the Referral Form(CMA F1) applicants were claiming to be paid a total of One Hundred Fifteen Million Thirty-Five thousand Tanzanian Shillings (TZS 115,035,000/= being 40 months salaries compensation for unfair termination, annual leave, overtime and one month salary in lieu of notice and to be issued with a Certificate of service.

On 3rd August 2023, Hon. Wilbard G.M, Arbitrator, having heard evidence of the parties issued an award in favour of the respondent that termination was fair both substantively and procedurally and dismissed the dispute. Applicants were aggrieved with the said award as a result, they filed this application praying the court to revise, quash and set aside the said award. In the joint affidavit and the supplementary joint affidavit in support of the application, applicants raised one ground namely:-

1. *That, the Arbitrator erred in law and facts by holding that termination was fair procedurally and substantively in disregard of the fact that:-*
   a. *Respondent did not use the criteria agreed for retrenchment.*
   b. *Three applicants namely Samwel P. Haule, Neema Lucas Londo and Hamimu Yunus Nindi and Mohmed Gharib Shabaani were not consulted.*
   c. *There was very short notice which was insufficient and unreasonable.*
   d. *Respondent failed to prove the reason for retrenchment.*

Respondent filed the Notice of Opposition, the counter affidavit and supplementary counter affidavit opposing this application.

By consent of the parties, this application was argued by way of written submissions. In compliance with the court's order of filing written submissions, applicants enjoyed the service of Mr. Nestory Nyoni, advocate, while the respondent enjoyed the service of Ms. Oliver Mkanzabi, Advocate.

Arguing in support of the application, Mr. Nyoni, advocate for the applicants, submitted that, the notice of retrenchment was issued on 28th August 2019 notifying the applicants that retrenchment was on the following days namely 29th August 2019 and referred the court to exhibit N-4. He submitted further that, the one-day notice that was issued by the respondent is not reasonable and defeats the rationale or purpose of consultation. He added that, consultation meeting was held on 29th August 2019 hence applicants were denied opportunity to consult

amongst themselves or their respective union, if any, for purpose of forming an informed opinion on the reason of retrenchment. To cement on his submissions that a single day notice for consultation was unreasonable, learned counsel for the applicants cited the case of ***NAs Dar Airco Co. Ltd vs. Emmanuel Igonda & Another***, Revision No. 38 of 2021, HC(unreported).

Counsel for the applicants submitted further that, respondent only consulted the 1st applicant and not all applicants. He cited the provisions of section 38(1)(d)(i), (ii), (iii) of the Cap. 366 R.E. 2019(supra)to cement on his submissions as to the people who were supposed to be consulted. He further submitted that, contrary to the law, respondent forced the applicants to be represented by a trade union while they were not members hence there was no consultation at all. He added that, in such a situation, the arbitrator erred to hold that there was consultation.

On criterial of retrenchment, counsel for the applicants submitted that, respondent did not use "First in Last Out" criteria because Brian Shonga(PW2) was not retrenched despite the fact that he was employed later than the applicants. He submitted that, in his evidence, Musa Coudger(DW1) did not state additional skill and competence that Brian Shonga(PW2) was possessing compared with the applicants. He went of

that, failure to apply the criteria of First in Last out means that, respondent did not comply with procedures.

Counsel for the applicant further submitted that, respondent had a duty of proving that termination was fair and cited the provisions of section 39 of Cap. 366 R.E. 2019 to support his submissions.

Counsel for the applicants submitted that, respondent did not disclose reasons for retrenchment contrary to the provisions of section 38(1)(b) of Cap. 366 R.E. 2019. He submitted further that, the audited financial report (exhibit N-10) was signed on 29th July 2020 hence it was not possible for the said report to be disclosed to the applicants in 2019. Counsel concluded that termination was unfair for want of reason and procedure and prayed the court to revise the CMA award.

On the other hand, in his written submissions Ms. Mkanzabi, learned advocate for the respondent submitted that, respondent complied with the provisions of Rule 23(4) of GN. No. 42 of 2007 and that respondent complied with the provisions of section 38 of Cap. 366 R.E. 2019. She further submitted that, the notice was issued to all employees and that consultation meeting was held on 29th August 2019. She added that, in the consultation meeting, respondent disclosed reasons for retrenchment, measures to avoid retrenchment, criteria for retrenchment and package thereof. Briefly as she was, counsel for the

respondent concluded that termination was fair both substantively and procedurally and prayed this application be dismissed for want of merit.

I should point out that initially I thought that the application was time barred based on what applicants indicated on the CMA record and asked the parties to make submissions thereon. But after careful scrutiny of evidence and reading exhibits that were tendered by the parties, I found that by mistake, applicants indicated on the CMA F1 the incorrect and a correct date. Based on the correct date that applicants indicated also on the CMA F1, after scrutiny of evidence as I have stated shortly hereinabove, I found that the dispute was not time barred. I will therefore not discuss submissions of the parties on that aspect.

I have examined the CMA record and find that, in his evidence, Musa Daud Coudger (DW1) stated *inter-alia* that, applicants were served with notice of retrenchment on 31st August 2019(exhibit N6 Collectively) and tendered final settlement report (exhibit N7 collectively without objection. It was further evidence of DW1 that, applicants were consulted and were paid their terminal benefits through their bank accounts. On the other hand, both Abubakary Rashid Shekifu(PW1), the 1st applicant and Brian William Shonga(PW2) not amongst the applicants, the only witnesses who testified on behalf of the applicants, in their evidence said nothing in relation to exhibit N7. In other words,

they said nothing in relation to final settlement report(exhibit N7 collectively) hence evidence relating to final settlement report(exhibit N7) went unchallenged. I take that evidence as true.

I have examined final settlement report(exhibit N7 collectively) and find that, (i) Abubakary Rashid Shekifu, 1st applicant was paid 193, 772.32 in his bank account No. 0152413161900 maintained at Cooperative Rural Development Bank after deductions and that the said amount included termination unused leave of 219668.90, (ii) Samwel Paul Haule, the 2nd applicant was paid 219668.90 as termination unused leave and that the whole amount that was paid to him in his bank account No. 20310018611 maintained at the National Microfinance Bank after deduction is 197543.16, (iii) Neema Lucas Londo, the 3rd applicant was paid inter-alia termination unused leave 219668.90 and that the whole amount she was paid in her bank account No. 62654483511 maintained at First National Bank Ltd is 1937772.32, (iv) Hamimu Yunus Nindi, the 4th applicant was paid through his bank account No. 22310016914 maintained at the National Microfinance Bank and (v) Mohamed Gharibu Shabaani, the 5th applicant was paid 142056.96 in his bank account No. 152395148900 maintained at Cooperative Rural Development Bank after deductions. I should point that, exhibit N7 collectively was admitted without objection. Not only that but also

applicants did not dispute to have been paid salary for September 2019 as reflected in the pay slip (exhibit N8 collectively that also was admitted without objection.

From the foregoing, it is my view that, applicants were paid terminal package and after reception of the said money, they were estopped to challenge fairness of the said retrenchment. I am of the considered opinion that, if applicants were unhappy with consultation process, they were, in terms of section 38(2) and (3) of Cap. 366 R.E. 2019 and Rule 23(8) of GN. No. 42 of 2007, supposed to refer the matter at CMA, where, upon failure of mediation, the dispute was supposed to be heard within 30 days and the aggrieved party had a chance of filing revision before this court before accepting the said payment. In terms of Rule 23(9) of GN. No 42 of 2007 (supra), had the applicants filed the dispute at C MA, that would have barred the respondent from implementing retrenchment unless otherwise agreed between the applicants and the respondent. Therefore, by accepting money that was paid in their bank accounts, applicants were caught by the doctrine of issue estoppel. On the application of issue estoppel see the case of ***Getha Ismail Ltd V. Soman Brothers*** [1960] EA 26 and ***Ngaile V. National Insurance Corporation of Tanzania Ltd*** [1973] EA 56, ***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 and ***Muhimbili National Hospital vs Linus Leonce***, Civil Appeal No. 190 of 2018 [2022] TZCA 223 to mention but a few.

In ***Leonce's case*** (Supra), the Court of Appeal held as hereunder:-

> *"It is our considered opinion therefore that from the above parties' partly quoted letters, any prudent reader would conclude… that on account of frustration of the contract of service between the parties, the appellant had no other option but to terminate the contract and pay the appellant the proposed benefits… the respondent had two voluntary options, to accept the offer and the proposed terminal benefits or otherwise… respondent accepted the offer of mutual termination of the contract. He acceded to the proposed termination upon the appellant's undertaking to pay the proposed package within two weeks of his reply. Accordingly, the respondent was paid. They were done and parted company.*
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> *It follows therefore that with all that undisputed, by necessary implication on such terms the respondent agreed the appellant's offer for termination and received the agreed terminal benefits. In other words the appellant did all the needful in compliance with s. 2(1)(a) of the Law of Contract Act Cap.345 R.E.2019.*
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> *In other words, the Common Law doctrine of estoppel bars the parties, in this case the respondent from running away from their previous freely made choices. It bars them denying their previous freely made choices. The*

ground of appeal is allowed. We think the labour dispute was misconceived."

It was submitted on behalf of the applicants that, applicants were denied opportunity to consult amongst themselves because the notice was too short. I have read evidence of PW1 and PW2 and find that, in their evidence, they did not state that time available for consultation was too short. It is clear that, the period is too short but, from where I am standing, I cannot fault the arbitrator on that, in absence of evidence by the applicants themselves. This being a revision application, my decision is supposed to be based on evidence adduced by the parties at CMA and not otherwise.

It was submitted by counsel for the applicants that, respondent forced the applicants to be represented by a trade union while they were not members hence there was no consultation at all. With due respect to counsel for the applicants, that submission is not supported by evidence by the applicants namely PW1 and PW2. It is a new issue that was not raised at CMA. In other words, it is submissions from the bar, which, does not and cannot, be regarded as evidence. It is my view that, these submissions cannot help the applicants in the application at hand because, they did not, prior to receiving retrenchment packaged, file the dispute at CMA challenging the retrenchment process. After

receiving payment as indicated by final settlement report(exhibit N7 Collectively), they are estopped to challenge fairness of the whole retrenchment process. In short, based on issue estoppel, all what was submitted by counsel for the applicants has no room at this stage. Those were good reasons to be advanced and considered by this court had the applicants not accepted or challenged retrenchment package as shown by final settlement report(exhibit N7 collectively). Since final settlement report (exhibit N7 collectively) was not challenged at CMA, I find that applicants filed the dispute at CMA as an afterthought.

For the fore going, I hereby dismiss this application for want of merit.

Dated in Dar es Salaam on this 4th March 2024.

B. E. K. Mganga
JUDGE

Judgment delivered on this 4th March 2024 in chambers in the presence of Abubakary Rashid Shekifu, the 1st Applicant and Geofrey Paul, Advocate for the Respondent.

B. E. K. Mganga
JUDGE