IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 48 OF 2020

BETWEEN

PETER MARIO CONSTANTINE.....1ST APPLICANT

GODWIN PATRICK LWANTERE.....2ND APPLICANT

AND

AL-HUSHOOM INVESTMENT (T) LTD.....RESPONDENT

JUDGMENT

Date of Last Order: 17/02/2021

Date of Judgment: 09/04/2021

A. E. MWIPOPO, J

This Revision application arise from the decision of the Commission for Mediation and Arbitration (CMA) in labour dispute no. CMA/DSM/TEM/2018/133/2018 delivered by Hon. L. Kokusiima, Arbitrator, on 30/12/2019. Peter Mario Constantine and Godwin Patrick Lwantere, the Applicants herein, are praying for the orders of the Court in the following terms:-

1. That this Court be pleased to revise the award of the Commission for Mediation and Arbitration at Dar Es Salaam in CMA/DSM/TEM/2018/133/2018 delivered by Hon. L. Kokusiima, Arbitrator, on 30/12/2019 for end of justice.

2. The cost of this application be granted.
3. That this Court be pleased to grant any other relief it deems fits and just to grant.

The Application is accompanied by Chamber Summons supported by Affidavit of Godwin Patrick Lwantere. The Respondent namely Al-Hushoom Investment (T) Limited opposed the application through counter affidavit sworn by Evance Ignas John, the Respondent's Advocate.

The brief background of the dispute is that the Applicants were employed by the Respondent in divers' dates in the year 2012 as Security Guards at the Inland Dry port Container Yard (ICD). They were terminated for operational requirements on 07/05/2018. The Applicant referred the dispute to the Commission which decided in favour of the Respondent. Aggrieved by the Commission award the Applicants filed the present application for revision.

The parties to the present application were both represented. Mr. Samson Russumo, Advocate, represented the Applicants, whereas the Respondent was represented by Mr. Evance John, Advocate. Hearing of the application proceeded by way of written submissions following court order.

The Applicants' counsel submitted in support of the application that the trial Arbitrator erred to hold that the Respondent proved the case on balance of probabilities and the employer had no other alternative except

terminating the service of Applicants. The procedure for termination on operational requirement is provided under section 38 of the Employment and Labour Relations Act, 2004. The Respondent did not avail the Applicants to be heard and the time to explain their opinion in respect of the Respondent's purported retrenchment. The Applicants testified as PW1 and PW2 that the Respondent did not conduct a proper consultation as provided under section 38(1) (b) of the Act. The right to be heard is fundamental requirement under Tanzania Constitution of 1977. The said consultation was supposed to be conducted prior to retrenchment. The Respondent did not comply with the legal requirement. The Respondent did not explain the methods of selection of employees to be retrenched, timing of the purported retrenchment was improper and the severance allowance paid was not explained properly as it is shown in the exhibit AH4-Minutes of the Meeting on the retrenchment of the employees in the Security Unit. The said consultation was against procedure and aimed to terminate Applicants employment and deny their terminal benefits.

The Counsel submitted further that the Applicants were not represented by any trade union. The testimony of Respondent Human Resources Manager one Arafat Ally – DW1 shows that the alleged consultation meeting was held for only 30 minutes as DW1 had no time. This was a denial of right to be heard contrary to principal of natural justice.

Under section 39 of the Employment and Labour Relations Act it is the duty of the employer to prove that the termination was fair. The Respondent failed to prove that the termination was fair.

The Applicants are of the view that the act of engaging Biwad Security Company to replace them was just a way to terminate them. The Applicants' were scapegoat simply for the reason that they were at front line to claim for their accumulated unpaid overtime payments. In order to close Applicants mouth the Respondent terminated them through retrenchment. From 18 Security Guards employed by the Respondent only the two Applicants' were retrenched. The Respondent did not pay accumulated overtime payment in the terminal benefits despite the fact that there is compliance order – Exhibit P2 from the Commissioner for Labour to the Respondent ordering him to pay the accumulated overtime. Then, the Applicants' counsel prayed for the application to be allowed and the Respondent be compelled to pay unpaid accumulated overtime, statutory compensation and cost.

In opposition to the Applicants' submission the Respondent's counsel submitted that the Respondent employed all the legal procedures for retrenchment of the Applicants. The Respondent decided for good reason to engage a private security company called Biwad Security Services Limited to carry security services at the Respondent's yard. He followed all laid down

procedures under section 38 of the Employment and Labour Relations Act, 2004. The relationship between the Applicants and the Respondent was good from the day the Applicants were employed. It was until the year 2018 when the Respondent restructured the security department and engage a private company to render security services at its Temeke yard where the dispute arose. After signing the engagement contract with the said company the Respondent retrenched security guards it employed so as to give way for the security guards from the engaged company. The retrenchment exercise affected the Applicants.

The Counsel submitted further that in the course arbitration hearing DW1 testified that the private security company was engaged to increase efficiency. Also the said company had insurance cover which compensates the Respondent in case of damages or loss at Respondent's yard. In carrying out the retrenchment exercise the Respondent followed all the procedures from issuing notice to retrench as proved by letter – Exhibit D2, the Respondent issued a notice – Exhibit D3 for the Applicants to attend meeting for the purpose of discussing the retrenchment process and their legal entitlements. The meeting took place and the Applicants attended, participated and they agreed to the retrenchment proposal as proved by minutes of the meeting – Exhibit D4. The Applicants were paid their entitlements and then they were given termination letter – Exhibit D5. The

Applicants acknowledged to receive the benefits and that they have no further claims against the Respondent as proved by acknowledgement letter – Exhibit D6. Thus, all the procedures were followed and the Applicants were given rights to be heard.

It was submitted further that the right to be heard is exhibited by the Applicants' signing and agreeing to their final benefits as shown in Exhibit D6. If not satisfied with the retrenchment process the Applicants' were supposed to challenge the retrenchment process before the CMA for mediation before the process is concluded as per section 38(2) of the Act. To support the position the Counsel cited the case of **Resolution Insurance Ltd vs. Emmanuel Shio and 8 Others**, Revision No. 642 of 2019, High Court Labour Division, t Dar Es Salaam, (Unreported).

He submitted that the Applicants' allegation that the Respondent Human Resources Manager had very little time to conduct consultation meeting and did not allow question from the employees was not backed by any evidence. The same is the allegation that the Applicants were retrenched because they were in frontline to claim for their overtime payment which has no evidence to support. The compliance order – Exhibit P2 alleged to be addressed to the Respondent by Labour Officer does not bear Applicants names in it. Thus, the claim for accumulated overtime are baseless. The

Respondent's counsel prayed for the Revision application be dismissed since it is devoid of merits.

In rejoinder, the Applicants' counsel retaliated his submission in chief and distinguished the case cited by the Respondent between **Resolution Insurance Limited** and **Emmanuel Shio and 8 Others**, (Supra), the consultation was properly held while in the present application there was no proper and fair consultation.

After reading submissions from both parties, I find it relevant in determining the present application to examine the law which oversee the termination of employment and specifically termination for operational requirements (Retrenchment). The termination of employment is provided by section 37 of the employment and Labour Relations Act, 2004. The Act provides in section 37 (1) that it shall be unlawful for an employer to terminate the employment of an employee unfairly. Section 37(2) of the Act provides further that the termination is unfair if the employer fails to prove that the reason for termination is valid and fair or/and failure to prove that the procedure for termination was fair. The section reads as follows:-

> *"37 (2) A termination of employment by an employer is unfair if the employer fails to prove-*
>
> *(a) that the reason for the termination is valid;*
>
> *(b) that the reason is a fair reason-*

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer, and

(c) that the employment was terminated in accordance with a fair procedure."

The above section requires employers to terminate employees on valid and fair reason and on fair procedures. Under section 39 of the Act, in any proceedings concerning unfair termination of an employee by an employer the duty is upon the employer to prove that the termination is fair. Thus, the employer herein had duty to prove that the reason for termination was fair as well as the procedure for termination was fair.

The Applicants' herein were terminated for operational requirements (retrenchment). According to rule 23(2) of the Employment and Labour Relations {Good of Good Practice} Rules, G.N. No. 42 of 2007 the reasons for termination by operation requirement (retrenchment) may be economical needs, or technological needs or structural needs a similar reasons to this one. The evidence available in this application especially the testimony of Arafat Ally – DW1 shows that the reason for termination was technological and economic needs which led to the structural changes following the act of the employer to engage BIWAD Security Services Co. Ltd to provide security services at Respondent's Temeke yard. The DW1 testimony was proved by

the contract of engagement – Exhibit H1. The Applicants were of the view that the Respondent engaged the security company in order to terminate their employment since they were in the frontline in their claims for overtime payments. However, there is no evidence whatsoever to support the allegation. There is no proof whatsoever to show that the Applicants had any overtime claims against the Respondent. The alleged compliance order – Exhibit P2 which was issued to the Director of the Respondent does not show the names of the alleged employees, thus it cannot be said the said Exhibit P2 was a proof that the Applicants had any claims against the Respondent. Therefore, I find that the reason for termination of Applicants employment was valid and fair.

After finding that the reason for termination was valid and fair the next question is if the procedure for termination of Applicants' employment was fair. The Employment and Labour Relations Act, 2004 provides in section 38 for procedures in the termination based on operational requirements (retrenchment). Section 38 (1) of the Act reads as follows:

> *"38.-(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 minimise 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,

(d) shall give the notice, make the disclosure and consult, in terms of this subsection, with-

(i) any trade union recognised in terms of section 67;

(ii) any registered trade union with members in the workplace not represented by a recognised trade union;

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

From above provision, in termination for operational requirement the employer is required to comply with the above mentioned procedures.

The Applicants in their submission alleged that there was no proper consultation prior to retrenchment as they were not allowed to ask question to the Human Resources Manager hence they were denied right to be heard. The Respondent did not explain the methods of selection of employees to be retrenched, timing of the purported retrenchment was improper and the severance allowance paid was not explained properly. In opposition the Respondent submitted that all the procedures were adhered and if there was

any dissatisfaction with the retrenchment process the Applicants' were supposed to challenge the retrenchment process before the CMA.

Looking at the evidence available it shows that the Respondent issued a notice to retrench– Exhibit D2, then he issued a notice to attend consultation meeting – Exhibit D3. The minutes of the meeting – Exhibit AH4 shows that meeting took place on 27/03/2018 and the Applicants attended. The Exhibit AH4 shows that among the agenda of the meeting includes reasons for intended retrenchment and entitlements to the employee to be retrenched. The Exhibit AH4 was signed by the Applicants which shows that the Applicants were satisfied with the content of the respective minutes. Despite the fact that the criteria for retrenchment was not stated in the minutes but the evidence shows that the Respondent decided to retrench all Security Guards at his Temeke yard after he decided to engage security company. Thus, the criteria for selection of employees to be retrenched was not relevant.

The evidence shows further that the Applicants were paid their entitlements and then they were given termination letter – Exhibit D5. The Applicants acknowledged to receive the benefits and that they have no further claims against the Respondent as proved by acknowledgement letter – Exhibit D6. This evidence available proves on balance of probabilities that

the procedures for retrenchment were followed and there was proper consultation prior to retrenchment exercise. If at all the Applicants were not satisfied with the retrenchment process the law requires them to file a dispute for mediation before the Commission according to section 38(2) of the Employment and Labour Relations Act, 2004, (See. **Resolution Insurance Ltd vs. Emmanuel Shio and 8 Others**, Revision No. 642 of 2019, High Court Labour Division, t Dar Es Salaam). Therefore, I find that the Respondent proved that the procedure for retrenchment were fair.

Consequently, I find the application is devoid of merits and I hereby dismiss it. The CMA award is upheld. Each party to bear its own cost of the suit.

A. E. MWIPOPO
JUDGE
09/04/2021