IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 293 OF 2016

BETWEEN

OIL GAS & MARINE (T) LTD .....APPLICANT

VERSUS

JOVENT MUSHWAIMI & 19 OTHERS..... RESPONDENTS

JUDGMENT

Date of Last Order 16/04/2018

Date of Judgment 27/04/2018

NYERERE J.

The applicant/ **OIL GAS & MARINE (T) LTD** have filed the present application seeking revision of the decision and award of the Commission for Mediation and Arbitration Labour Dispute No.CMA/DSM/KIN/R.230/15/686 (Herein to be referred as CMA) which was delivered on 2nd June, 2016 in favour of the respondent/ **JOVENT MUSHWAIMI & 19 OTHERS**.

The applicant, a company dealing with provision of Security Services with Vasta Properties Limited effectively from 15th March, 2014; the respondents

worked as Security Guards at Viva Towers from 1st September, 2014 to 31st March, 2015 when applicant terminated their employment; on operation reasons. Aggrieved by such decision, the respondents referred a dispute to the Commission for Mediation and Arbitration (herein CMA). CMA found the applicant had valid reason to retrench respondents and procedure were followed, however went on to order applicant to pay respondents one months salary as Notice pay. Such a decision aggrieved applicant who filed this revision application faulting the CMA award on the grounds articulated in paragraph ten (10) of the supporting affidavit;

a) The Order for pay payment of one month salaries to the respondents by the applicant does not reflect the findings made by the Honourable Arbitrator since that such Order was made regardless of the fact that the respondents were duly notified and consulted accordingly prior to the retrenchment.

b) The Order for payment of one month salaries to the respondents by the applicant was made regardless of the fact that the respondents worked for the whole period of notice up to 31st March, 2015 and salaries therefore were duly paid to them on the 1st day of April, 2015.

During the hearing the applicant's were represented by Mr. Arnold Luoga, Advocate whereas the respondents was represented by Mr. Aidan Kitare, Advocate. Ultimately the hearing proceeded viva vorce.

Mr. Arnold Luoga Counsel for Applicant prayed to adopt the Affidavit in support of the application to form part of his submissions. Submitting in support of the application Counsel for Applicant referred section 44(1) and Section 41(5) of the Employment and Labour Relations Act, No. 6/2004, on termination of employment, and proceeded to argued respondents worked for the Applicant from 18th February, 2015 to 31st of March, 2015 and were given Notice before retrenchment. However Arbitrator awarded the Respondents salaries for the month which they had been duly paid, therefore Counsel for applicant prays this application be allowed.

Furthermore Mr. Arnold Luoga Counsel for Applicant abandoned ground No. 2 of the Revision in which would be a repetition of what has already been submitted in the first ground. He humbly prayed the application be granted.

In rebuttal Mr. Aidan Kitare Counsel for Respondents brought to the attention of the court the provision of Section 41(5) of the Employment and Labour Relations Act No. 6/2004 as cited by Counsel for applicant on conditions for awarding Notice pay. Counsel for Respondents was of the view

that Arbitrator correctly awarded Notice pay to the Respondents, therefore he prayed the Court to dismiss this application.

In rejoinder Mr. Arnold Luoga Counsel for Applicant reiterated his submission in chief and argued further and interpreted Section 41(5) of Employment and Labour Relations Act No. 6/2004, that payment of notice would be proper or is awarded only if employer does retrench employee, without notifying the employees prior to the decision to retrench. Counsel for Respondent was of the view in the circumstance; the employer is required by the law to pay remuneration in lieu of notice to the employees.

However Counsel for applicant argued that in the present case Respondents were duly notified of the intention to retrench, and they worked during that Notice period and were duly paid. It is his contention that, the Arbitrator misconceived the interpretation of Section 41(5) of the Employment and Labour Relations Act No. 6/2004 in awarding the respondents payment of one month salary. And prayed the application be allowed.

I have gone through both parties submission, court records as well as relevant laws with the eyes of caution and I find the issue for determination on the above mention grounds is;

"Whether or not the arbitrator was correct to award Notice pay to the Respondents in other word whether Notice pay complied with requirement set forth by the law".

In answering this issue whether the arbitrator was correct to award Notice pay to the Respondents. In this case, it is undisputable that the termination was procedurally fair as subscribed in the case of Rwekiza & 11 Others v. Bs Stanley Mining Services Revision No. 23/2012 Hon. Judge R. Rweyemamu at page 4 2nd paragraph held that;

" .....That Section 38 of the Act, read together with Rules 23 – 24 of the Employment and Labour Relations (Code of Good Practice) Rules GN. 42/2007 (THE CODE), provide various stages which are not meant to be applied in a check list fashion, rather are meant to provide guidelines to ensure that consultation is fair and adequate".

In which Section 38(1) of the ELRA requires;

S. 38 (1) "In any termination for operational requirement (retrenchment) an employer shall comply with the following principles:-

(a) That the **employer shall give notice of any intention** to retrench as soon as is contemplated. .....

(b) N/A

(c) N/A

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

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

(ii) any registered trade union with member in work place not represented by recognized trade union;

(iii) Any employees not represented by a recognized or registered trade union. (Emphasis mine)

From the records its apparent applicant complied with the mandatory procedures as stipulated on the above provisions. The issue at hand is arbitrator awarded Notice pay to respondents while the same was paid to respondents as terminal benefits as evidenced by Exhibit D5. The CMA records reveal further that respondents termination was due to operational reason, i.e that applicant lost business from his sole client (VIVA TOWER) therefore was compelled to retrench respondents. It is also in record that, applicant paid respondents terminal benefits as per joint meeting agreement in which respondents were paid as follows:

(1) Payment for the months of March, 2015

(2) Payment in lieu of accrued/pending leave

(3) Payment for the agreed of seven day for each completed year of service Severance pay and

(4) Certificate of Service as per Exhibit D5.

In regard to the above observation, I find the Arbitrator had no justification in awarding Notice pay to respondents after finding that there was valid reason to retrench respondents and procedure were followed. Quoting the arbitrators decision at page 11 of the CMA award that:

> "Tume imethibitisha kuwepo kwa sababu ya msingi iliyothibitishwa na mwajiri ya kuvunjiwa mkataba na kufanya vikao vya kuwashirikisha wafanyakazi na kutolewa taarifa kwa upande wa pili hivyo Tume imeona stahiki ya walalamikaji ni kulipwa stahiki zao kulingana na kifungu cha 44(1) ya sheria Na. 6/2004".

Consequently, I fault the arbitrator for ordering the applicant to pay each of the respondents Notice pay under Section 44(1) of the Employment and Labour Relations Act, No. 6/2004 because respondents are not entitled to as per law. I hereby quash and set aside the order to pay each respondent TSH

3,630,000/=, equivalent of one months' salary, as benefit. As such this revision application succeeds.

It is so ordered.

A.C. Nyerere

JUDGE

27/04/2018