**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 27988 OF 2023**

**HELENA CHINYUKA ..... APPLICANT**

**VERSUS**

**LETSHEGO (T) LIMITED T/A FAIDIKA MICROFINANCE..... RESPONDENT**

# JUDGMENT

*Date of last order:4/3/2024*
*Date of Judgment: 13/3/2024*

**B. E. K. Mganga, J.**

Facts of this application briefly are that, on 17th February 2014, Hellen Nathanael Chinyuka entered unspecified period of contract with Letshego Tanzania Limited as branch manager. Her duty station was in Lindi. Applicant was thereafter transferred to Mtwara Region. It happened that on 5th August 2021, respondent retrenched the applicant. Aggrieved with termination of her employment, on 31st August 2021, applicant filed Labour dispute No. CMA/DSM/MTW/46/2021 before the Commission for Mediation and Arbitration(CMA) at Mtwara complaining that respondent terminated her employment unfairly. In the Referral Form(CMA F1) applicant indicated that she was claiming to be paid (i) TZS 53,071,3777.48 being 36 months' salary compensation,

(ii) TZS 13,621,653.55 being severance pay, (iii)TZS 2,000, 000/= being leave pay and TZS 3,276,000/= being repatriation costs. While the dispute was at mediation stage at Mtwara, applicant prayed the same be transferred to Dar es salaam, as a result, on 28th September 2021, after the Commission has heard submissions of both sides, issued an order transferring the dispute to Dar es Salaam.

On 18th October 2023, Hon. Makanyaga, A.A, Arbitrator, having heard evidence of the parties, dismissed the dispute on ground that termination was fair both substantively and procedurally. Applicant was aggrieved with the said award hence this application for revision. In her affidavit in support of the application, applicant raised five grounds namely:-

1. *The arbitrator erred in law and facts by failure to evaluate evidence tendered.*
2. *That, the arbitrator erred in law and fact in failing to find that applicant was condemned unheard in retrenchment.*
3. *That, the arbitrator erred in law and facts in hold that termination was fair while retrenchment was conducted without involvement of the applicant.*
4. *That the arbitrator erred in law and facts in failing to understand that consultation process in retrenchment has to result in voluntary agreement and failure of which the respondent was supposed to file the matter before the Commission for Mediation and Arbitration.*
5. *That, the arbitrator erred to hold that procedure was fair and that respondent had a fair reason to terminate employment of the applicant.*

When the application was called on for hearing, Ms. Halima Semanda, advocate, appeared and argued for and on behalf of the applicant, while Mr. Jimmy Mrosso, advocate, appeared and argued for and on behalf of the respondent.

Arguing in support of the 1st ground of application, Ms. Semanda, learned advocate for the Applicant submitted that, the arbitrator misdirected herself in holding that termination was fair. Learned counsel for the applicant submitted that, section 38 of the Employment and Labour Relations [Cap. 366 R.E. 2019] provides procedures of which an employer is obliged to follow. She submitted further that, this being termination by retrenchment, respondent was supposed (i) to issue notice of retrenchment, (ii) to disclose relevant information (ii) to make consultation prior to retrenchment and (iv) finally conduct retrenchment. Learned counsel for applicant went on that, none of these requirements were adhered to, by the respondent. She further submitted that, the arbitrator referred to exhibit LET 1, LET 3. LET 4, LET 5, LET6, LET 7 and LET 8 and concluded that, the procedure was adhered to. She went on that, in the award, the arbitrator stated further that, it is not mandatory for the employer to adhere to procedures under section 38 Cap. 366 R.E. 2019(supra). Learned counsel for the applicant submitted that, that was a misdirection on part of the arbitrator and cited the case

of ***Walk Water Technologies v. Recho Charles,*** Revision No. 318 of 2016, HC(unreported) to support her submissions that, the requirement in section 38 of Cap. 366 R.E. 2019(supra) is mandatory and must be complied with by the employer.

Learned counsel for the applicant went on to submit that, in his evidence, DW1 failed to prove that the notice was properly served to the applicant. She strongly argued that, in absence of exhibit that was tendered to show that a notice was issued to the applicant, it was an error on part of the arbitrator to hold that procedures were adhered to.

Arguing in support of the 2nd and 3rd grounds, learned counsel for the applicant submitted that, section 38(1)(a) of Cap. 366 R.E. 2019(supra) and Rule 23(1), (2), (3),(4),(5),(6) and (7) of the Employment and Labour Relations(Code of Good Practice) Rules, GN. No. 42 of 2007, requires a notice of intention of retrenchment be served to the employee as soon as the employer contemplates retrenchment. Counsel submitted that, in the application at hand, the only communication that was done by the respondent is the attendance register in the meeting. She submitted further that, Applicant was not served with the notice of retrenchment. She went on that, even DW1 during cross examination admitted that there is no proof that applicant was served with the notice of retrenchment. She concluded that, without

proof of notice, arbitrator erred to hold that procedures were adhered to.

Arguing the 4th ground, Ms. Semanda, submitted that, Rule 23( c) of GN. No. 42 of 2007(supra) requires consultation process to commence as soon as possible at the time the employer contemplates retrenchment. She further submitted that, there was neither notice of retrenchment nor consultation. She argued that, Applicant was involved in a meeting because of her position as branch manager as she attended representing other staffs and did not participate in a meeting in her own capacity.

Learned counsel for the applicant submitted further that, respondent proceeded to make some payments to the applicant while there was no consultation or agreement for retrenchment. She added that, applicant was paid immediately after retrenchment. When probed by the court, counsel for the applicant conceded that applicant did not return the amount that she was paid by the respondent. Learned counsel for the applicant clarified that, money was paid in applicant's bank account on 6th November 2021 without her knowledge. She went on that, during cross examination, both DW1 and DW2 testified that, respondent only opted to make payment to the applicant without referring the matter at CMA. She argued that, even if applicant was

aggrieved with procedures, respondent could have proceeded to make payment as she intended. Ms. Semanda submitted further that, there is no evidence on record showing that applicant was involved in retrenchment process. She concluded that, there was disagreement between the parties, but respondent did not refer the matter to CMA.

Arguing in support of the 5th ground, counsel for the applicant submitted that, evidence tendered indicates lack of disclosure regarding retrenchment because the reason for retrenchment was not disclosed. She also submitted that, respondent asserted that reason for retrenchment was (i) poor performance of the employees, (ii) the requirement by BOT that respondent should employ graduate staffs and (iii) a need to transform from analog to digital system.

Learned counsel for the applicant submitted further that, during cross examination, DW1, DW2, and DW4 stated that, the criteria used to retain some employees included possession of a degree. She went on that, DW1 admitted that, applicant was a graduate with a bachelor's degree. She further submitted that, respondent did not share any report with the applicant to show how poor she was performing and how respondent was affected. She argued further that, respondent did not take any effort to minimize the effect of retrenchment.

Counsel for the applicant concluded here submissions that termination was unfair and prayed that the application be allowed, applicant be awarded 36 months salaries because applicant was employed for unspecified period.

Responding to submissions on the 1st ground, Mr. Mrosso, learned counsel for the respondent submitted that, applicant has failed to point out evidence that was not analyzed by the Arbitrator. Counsel submitted that, the notice of retrenchment was served to the applicant and all other employee on 27th July 2021(exhibit .LET4). He added that, the said exhibit was also sent to the applicant in her email. Learned counsel for the respondent submitted further that, according to the minutes of the consultative meeting that was held on 2nd July 2021(exhibit LET 7), Applicant was consulted. Learned counsel for the respondent submitted further that, Applicant travelled from Mtwara to Dar es Salaam for the said consultative meeting. Learned counsel submitted that, applicant is estopped to deny what she signed in the meeting on 2nd July 2021. On the issue estoppel, learned counsel for the respondent cited that case of ***Standard Charted Bank Tanzania Ltd vs. Justine Tineishemo, Revision No.*** 184 of 2022, HC(unreported). He added that, Applicant accepted terminal benefits. Mr. Mrosso submitted further that, in her evidence, applicant stated that she was surprised that her bank account

was credited with some money and asked the respondent, after being notified the reason for that money, to be paid repatriation costs. Learned counsel submitted further that, after applicant's claim for repatriation, respondent paid applicant repatriation costs. Counsel for the respondent submitted that, applicant should be estopped to deny what she received as retrenchment package. As a proof that applicant was paid terminal benefits, learned counsel prayed the court to consider exhibit LET 10, LET 11, LET 8 and LET 5. He added that, Applicant was member of FIBUCA, a trade union, that was also involved in consultation and concluded that the provisions of section 38 of Cap. 366 R.E. 2019 (supra) was complied with.

Regarding the 2nd and 3rd grounds, learned counsel for the respondent briefly submitted that, applicant was heard as evidenced by exhibit LET 7 and that she was consulted.

Regarding the 4th ground, Counsel for the respondent submitted that, applicant agreed to retrenchment and signed exhibit LET 7 and received retrenchment package including repatriation cost. Counsel submitted that, the principle of issue estoppel should apply against the applicant. Mr. Mrosso argued that, respondent did not refer the matter to CMA because parties agreed.

Learned counsel for the respondent further submitted that, the arbitrator evaluated evidence and concluded that termination was fair both substantively and procedurally. He went on that, there was no discussion on poor performance of the employee, rather, it was discussion relating to poor performance of the respondent financially. Learned counsel for the respondent concluded by praying that the application e dismissed for want of merit.

In rejoinder Ms. Semanda, learned counsel for the applicant reiterated her submissions in chief. She maintained that applicant did not sign any agreement with the respondent to terminate her employment. Learned counsel conceded that, applicant acknowledged to have been paid repatriation package prior to filing the dispute at CMA.

I have examined evidence of the parties in the CMA record and considered submissions of the parties in this application and find that, in his evidence, applicant admitted that, a notice of retrenchment was issued by the respondent and further that, she participated in the consultation meeting. In fact, minutes of the joint consultative meeting held on 2nd August 2021 at Ramada Hotel (exhibit LET 7) is loud and clear and supports what applicant stated in her evidence because, she signed the said exhibit. More so, in her evidence, applicant(PW1) stated that, reason for retrenchment was operational requirement and that,

that was a valid reason. The same reason for retrenchment is reflected in exhibit LET 7. I find that respondent had a valid reason for termination of employment of the applicant.

It was argued on behalf of the applicant that respondent did not follow procedures for termination. With due respect, evidence available in the CMA record does not support submissions made on behalf of the applicant.

It was submitted by counsel for the respondent that, applicant is estopped to deny what she agreed with the respondent including acceptance of terminal benefits. It was also conceded by counsel for the applicant that, the latter was paid terminal benefits. I totally agree with counsel for the respondent that, under the principle of issue estoppel, applicant is estopped to deny what she agreed with the respondent including acceptance of terminal benefits. I am of that view because, in her evidence, applicant was recorded stating *inter-alia* that:-

> *"…Vikao nilishiriki kama branch manager Mtwara…Baada ya kuona hela nyingi zimeingia kwenye akaunti yangu nilimpigia simu HR aliniambia kuwa mimi ni mmoja wa wanaoondolewa kutokana na sababu walizozitaja. Lakini pia nilishiriki katika vikao.*
>
> *Baada ya kupewa maelezo hayo ikabidi nijiridhishe kutokana na hayo malipo ambapo niligundua sijalipwa pesa ya kusafirisha mizigo. Nilimpigia simu H.R nikamwambia katika pesa aliyonipa sijaona pesa ya mizigo. Hakuonesha ushirikiano kulikuwa na usumbufu baadae nikaamua kumtumia email ilikuwa mwezi wa tisa wakati zoezi lilikuwa mwezi wa nane ndipo akajibu niangalie*

*akaunti yangu. Kitendo cha kushindwa kunilipa pesa ya usafiri ilikuwa usumbufu kwangu…"*

The above quoted evidence of the applicant tells all that she accepted terminal benefits and that, when she noted that repatriation costs were not included in the said terminal benefits, she communicated to the respondent's Human Resources Manager. It is clear in evidence of the parties that, the said repatriation costs were thereafter paid to the applicant because respondent noted that, by mistake, the same was not paid. It is my view that, after receiving terminal benefits including repatriation costs, applicant was estopped to challenge fairness of termination of her employment. In fact, there is no evidence proving that she thereafter returned the said payment to the respondent. My conclusion that after acceptance of payment applicant was estopped to challenge fairness of termination of her employment is fortified by what was held by the Court of Appeal I the case of ***Bytrade Tanzania Limited vs Assenga Agrovet Company Limited & Another*** (Civil Appeal 64 of 2018) [2022] TZCA 619 (7 October 2022), ***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 ***TUCTA's case*** (supra) while discussing issue estoppel held:-

*"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."*

The Court of Appeal referred also to the provisios of section 123 of the Evidence Act[Cap. 6 R.E. 2019) which provides that:-

*"123. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing".*

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

*"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.*

*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 ***Leonce's case*** (supra) the Court of Appeal concluded that the employee was barred to dispute what was agreed with the employer. In the application at hand, applicant is also estopped to challenge fairness of termination of her employment.

For all what I have discussed hereinabove, I find that the application is unmerited and consequently, I dismiss it.

Dated at Dar es Salaam on this 12th March 2024.

B. E. K. Mganga
**JUDGE**

Judgment delivered on 13th March 2024 in chambers in the presence of Halima Semanda, advocate fo the Applicant and Gema Mrina, advocate, holding brief of Jimmy Mrosso, advocate for the respondent.

B. E. K. Mganga
**JUDGE**