

TANZANIA / JUDGMENT

waziri ally mwahu another vs arusha international conference center 2022 tzhc 30 24 january 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY
OF ARUSHA AT ARUSHA REVISION APPLICATION NO.63 OF 2020 Original CMA/ARS/
ARB/282/2019) WAZIRI ALLY MWAHU..... 1st APPLICANT RASHIDI
HABIBU RASHIDI..... 2nd APPLICANT Versus ARUSHA INTERNATIONAL
CONFERENCE CENTRE.... RESPONDENT

JUDGMENT

25/10/2021 & 24/01/2022 GWAE, J Aggrieved by an award procured by the Commission for Mediation and Arbitration for Arusha at Arusha (CMA), the applicants, Waziri Ally Mwahu and Rashidi Habibu Rashidi. The applicants have now brought this application to the for revision under the provisions of section 91 (1) (a), (2) (a), (b) and (c) of the Employment and Labour Relations Act, No. 6 of 2004 (ELRA), Rules 24 (1), (2) (a), (b), (c), (d), (e), (f), (3)(a), (b), (c) and (d), 28 (l)(a), (c), (d) and (e) of the Labour Court Rules, GN No. 106 of 2007 (Rules), praying for the following Orders: i

1. That, this court be pleased to call for the records of the CMA and revise proceedings and set aside the Arbitration Award issued in the CMA/ARS/ARB/282/2019.
2. That, the court be pleased to determine the matter in the manner it consider it appropriate and give any other relief it considers just to grant. Facts of the dispute between the parties can be recapitulated as follows, that, both the applicants were employed by the respondent, Arusha International Conference Centre (AICC) in diversity dates that is in the 1988 and 1980 respectively however their contracts of employment of the came to an end on 1st July 2018 for the 1st applicant and on the 7th December 2018 for the 2nd applicant, both applicants' termination of their employment was through compulsory retirements. That, on the 2nd July 2019 the applicants filed the dispute against the respondent claiming to be paid their terminal benefits (four months' salaries each) pursuant to AICC's Group Endowment Assurance Scheme and AICC's Staff Incentive Scheme, 2014. The CMA's record further reveals that, it was the respondent's contention that the applicants were not 2 entitled to payment of the claimed four years' salaries each following an agreement entered by the

parties that is the applicants' representatives and the respondent before the applicants' retirement. Upon hearing of the parties' evidence in relation to the dispute, the CMA procured its award dated 17th July 2020 in favour of the respondent by holding and I quote; "According to section 42, 43 and 44 of ELRA..... in our Labour Laws or any other laws of the Nation, there is no any provision of the law that provides for the incentive payments to an employee, if the employer wishes to do so let him alone do so in his own wishes but no any employee can enforce that before this Commission or any court of law. Suffice to say that this dispute does not have legal basis to stand before the Commission, hence the bases for complaints does not exist any in law. The respondent has proved and established that the complainants attained the age of retirement and they were paid their dues as the labour law states". The application is duly supported by a sworn affidavit of the applicants' representative notably; Godween T. Kihaga in which grounds for the sought revision are clearly stipulated, these are; 3

1. That, the arbitrator erred in law and in fact in relying on mee words of the respondent without proof
2. That, the arbitrator erred in law and in fact by failing to evaluate evidence adduced by the applicants.
3. That, the arbitrator erred in law and in fact in dealing with issues which were neither raised nor disputed in the Commission as result it reached in erroneous conclusion.
4. That, the arbitrator erred in law and in fact in relying on his own assumption in determining the dispute at hand and awarding the respondent. On the other hand, this application was seriously opposed by the respondent through a counter affidavit of one Juliana Mrema, respondent's officer legal officer. When the application was called on for hearing, the applicants were represented by Godween T. Kihaga whereas the respondent was represented by Mr. Mkama Musalama, the learned state attorney from the office of Solicitor General assisted by Miss. Juliana, respondent's legal officer. 4 The applicants' representative merely sought for adoption of their affidavit duly filed in court and added as follows; Firstly, that, it was wrong for the Commission to hold that, there is no law that provides for incentive payment, according to him, section 71 (1) (3) (a) (b) (c) ELRA clearly provides for a binding collective agreement upon the parties. In our case, staff Reg. 2014, Incentive Scheme provides for incentive payment for retirees. Secondly, that, the alleged economic or financial constraint was not well founded since there was no notice that was issued to the employees nor was there a public notice or any minute. Thirdly, that, mere assertions that, there were buildings that were demolished resulting into economic hardship of the respondent was not clearly established to what and which houses were really demolished and fourthly, that, the alleged meeting was not sufficiently substantiated as DE3 bears no seal. Having argued as herein above the applicants' representative finally sought for an order dismissing this application. In resisting this application, Mr. Mkama to the arguments by the applicants' counsel as follows: firstly; that the arbitrator rightly held that the applicants are not entitled to incentive payment as per law however he admitted that under section 71 of

the ELRA incentive payment under 5 Incentive scheme of 2014. He added that, the payment depends on the economic status and that in the event of economic hardship, employees are notified through their trade union. Mr. Mkama further argued that the applicants in our case were notified via TUICO's representative as shown in (DE3). Secondly, he argued that, the financial constraint issue was explained and that the reason of demolition of some of the respondent's buildings lacked of tenants and another reason being pandemic reason (Covid-19) which was also explained and thirdly, that, the applicant's complaint on seal is not merited as same was not raised during arbitration before CMA. Mr. Kihanga rejoined to the arguments of the respondent's counsel by stating that to clause 7.0 of the scheme, requires involvement of both parties and issuance written notice of two months. He then urged this court to consider the applicants' affidavit, documents that were received by CMA and their oral arguments. Having briefly outlined what transpired during arbitration and hearing of this revision application, issues for determination are, whether the 6 arbitrator erred in law by holding that, there is no law that provides for incentive payments for employee if answered in affirmative, whether the applicants were not entitled to incentive payments. In the 1st issue, whether the arbitrator erred in law by holding that, there is no law that provides for incentive payments for employees. The arbitrator in his arbitral award held that there is no provision of the labour laws which entitle employees whose contracts of employment come to an end to incentive payments. He then made a reference to section 42, 43 and 44 of ELRA. The basis for the applicants' complaint emanates from parties' collective agreement as to the incentive scheme being attractive payments meant to motivate and retain an existing human capital or resource. However, the learned counsel for the parties admittedly argued that, incentive payment is provided under section 71 of the ELRA. That being the case I should therefore reproduce section 71 of the Act herein under; "71 (1) Collective agreements shall be in writing and signed by the parties. 7

- (2) A collective agreement shall be binding on the last signature unless the agreement states otherwise.
- (3) A collective agreement shall be binding on -
 - (a) the parties to the agreement;
 - (b) any members of the parties to the agreement;
 - (c) any employees who are not members of a trade union party to the agreement if the trade union is recognised as the exclusive bargaining agent of those employees under section 67.
- (4) A collective agreement shall continue to be binding on employers or employees who were party to the agreement at the time of its commencement and includes resigned members from that trade union or employer association.
- (5) A collective agreement becomes binding on employers and employees who become members of the parties to the agreement after its commencement.

- (6) Unless a collective agreement provides otherwise, any party to an agreement may terminate the agreement on reasonable notice and shall give reasons for the termination.
- (7) The parties to a collective agreement shall be required to lodge a copy of the agreement with the Labour Commissioner and shall be a rebuttable presumption that the copy so registered is authentic and may be executed as a decree of the Court. In the light of the provisions of section 71 of the ALRA, it is clear that under collective agreements is binding in nature between the parties provided it was made pursuant to the requirement of the law. It was therefore wrong for the arbitrator to hold that the applicants who attained the retirement age would not be entitled to incentive payments if there was collective agreement to that effect that the same procedurally and vividly made by the parties (See Thobias Ndege vs. Mwatex (2001) LTD., Rev. No. 110 of 2009 reported in Labour Court Case Digest of 2011-2012) Usually, an agreement between an employer and employee constitutes a valid contract provided that it is not against the labour laws and International Labour Standards or immoral agreement or illegal. In our case, the agreement, incentive scheme, 2014 is enforceable by the court of law or the Commission as the case may be, the incentive schemes, is in conformity with the labour laws and International Labour Standards they improve the employees' retirement package. This ground for revision is thus found meritorious. 9
- Coming to the issue, whether, the applicants were not entitled to incentive payments. It was the respondent's contention that the applicants were not entitled to incentive payments save one-year incentive pay following the agreement entered by the parties. Examining exhibit D3 (DE3-RE3), it is evident clear that there was a meeting between the respondent's Management and TUICO representatives held on the 31st January 2017 on employees' incentives. In that meeting, the 2nd applicant entered appearance in the capacity of TUICO-branch member. I have noted that previously, the respondent's employees, upon retirement, were paid incentives to the tune of five years' salaries depending on the number of years served by a retired employee (See PE17 at clause 7.1.10 and 7.1.11 of the Incentive Scheme dated 24th September 2014). In our case, both applicants have sufficiently and undoubtedly proved to have served with respondent for more than 25 years consecutively. They are therefore entitled to retirement package as per provisions of the Scheme, 2014 unless the contrary is proved by the respondent. io Nevertheless, I have diligently examined, the Incentive scheme and noted that the Scheme has its exclusivity or limitation to the provisions of incentive package where it provided that the AICC may provide less than the prescribed rate or incentive as the case may be in the event the respondent being in financial constraints during the respective financial year (See clause 8.0 and Clause 8.0 of the Incentive Scheme and Group Endowment Assurance Scheme) (PE17 and DE2)). In our instant dispute the respondent had been seriously asserting that it faced financial constraint due to the fact that some of its houses were demolished and there are inadequate tenants in the year 2018-2019 followed World wide spread of the Pandemic disease that is Covid-19 which is still prevailing to date. Similarly, I have also scrutinized, Minute of the Meeting held on the 31st day of January 2017 between the respondent's Management and representatives from Tanzania Union of Industrial and Commercial Workers (TUICO) (DE3) and observed

that the incentive payment which the applicants were to be paid is only one-year salary ("Incentive Scheme ya Shirika ya 2014, lakini utekelezaji wake inategemeana hali ya kifedha ya Shirika ambapo kwa sasa ni mshahara ghafi wa muda wa mwaka mmoja"). ii I am also compelled to closely ascertain if DE3 was genuine, it is as asserted by the applicants' counsel that, any agreement between the employer and trade union which is exclusive bargaining agent must be signed. According to the PE16, Collective Bargaining Agreement, it is certainly established that, TUICO was a sole legitimate representative of the respondent's employees including the applicants (See clause 3.0 of the Agreement). Without undue regard to the complaints given by the applicants that the DE3 dated 24th February 2017 bears no seal and that it was not signed by the employees' representative. Having carefully probed DE3- RE3, it my observations that, the applicants' complaints are nothing but an afterthought since the same was not raised during hearing before the Commission as the same was received without objection (See page 8 of the typed proceedings). Though it is true as complained of by the applicants that, the DE3 does not bear respondent's seal however it is trite law that, a party to proceeding or his advocate must object tendering of any exhibit if he so thinks instead of raising the same concern in an application for revision or appeal stage. 12 Considering the sufficient reasons for not paying the applicants as previously agreed by the parties vide two (2) Incentive Schemes and taking into consideration of the parties; meeting on the 31st January 2017,1 have therefore no reasons whatsoever justifying me to justly and fairly hold that, the applicants were entitled to the remaining four (4) years' salaries as incentive payments. That said and done, the impugned Commission award is quashed and set aside and equally confirmed to the above extent. Each party to be his or her costs. It is so ordered. 24/01/2021 Court: Right of appeal to the Court of Appeal fully explained 13

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