IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KITUSI, J.A., And KAIRO, J.A.)

CIVIL APPEAL NO. 112 OF 2017

CHARLES MWITA SIAGA ..... APPELLANT

VERSUS

NATIONAL MICROFINANCE BANK PLC ..... RESPONDENT

[Appeal from the Judgment of the High Court of Tanzania (Labour Division) at Dar es Salaam]

(Nyerere, J.)

dated the 14th day of November, 2016
in
Revision No. 451 of 2015

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JUDGMENT OF THE COURT

28th June, 2021 & 29th April, 2022

MWAMBEGELE, J.A.:

The appellant, Charles Mwita Siaga, was an employee of the respondent bank; the National Microfinance Bank PLC, working as a customer service manager at Temeke branch in Dar es Salaam Region. The employee appellant was employed by the respondent on 17.02.2003 as a Bank teller. As time went by, he was promoted from time to time up to the level of Customer Service Manager; the position he held until his employment was terminated on 07.10.2010. The appellant instituted a

dispute in the Commission for Mediation and Arbitration at Dar es Salaam (hereinafter referred to as the CMA) following his termination on charges of gross misconduct and failure to perform duties to the standard required. It was alleged that he authorized payments of cheques without making confirmation from the account holder or drawer thus causing a loss of approximately Tshs. 295,000,000/=. It was contended that the respondent, on diverse dates between December 2009 and February 2010, authorized payments of huge amounts through different cheques from Account No. 2246600034 in the name of Almas Stationery and Printing which were made contrary to bank procedures in that he did not seek authorization from the account holders. The cheques were cashed and payments made to Kennedy Alex Nyambory and Zakaria Maranya. The Bank procedures disallows encashment of cheques especially from third parties who are not account holders without getting confirmation and satisfying oneself of the genuineness of the cheques. The appellant's matter was taken before the Disciplinary Committee for hearing and determination.

After hearing before the Disciplinary Committee was conducted, the respondent was found to be at fault, therefore, it was ruled that he was

guilty of gross negligence for relying on verbal instructions to credit the disputed cheques contrary to the bank procedures that resulted into occasioning loss to the respondent, as a result of which, he was terminated.

Aggrieved by the decision of the disciplinary committee, the appellant lodged a labour dispute before the CMA, contesting his termination and so prayed to be reinstated without loss of employment benefits, on the ground that his termination was unfair in both procedure and substance. He pegged the complaint for unfairness on the ground that the respondent's Managing Director's Human Resources Disciplinary Committee (MDHRDC) had no authority to terminate him. He argued that the MDHRDC had authority over only non-managerial staff at the head office and not managerial staff like him. He also complained that the committee, after withdrawing the former charge and "acquitting" him, he was charged for the second time before the same committee and the end result was termination, hence his complaint of double jeopardy. The CMA ruled that the respondent had valid reasons to terminate the appellant and that, despite minor procedural irregularity, he was fairly terminated.

The appellant was aggrieved by the decision of the CMA. He thus applied for revision of the decision in the High Court of Tanzania, Labour Division through Revision No. 451 of 2015. The High Court, upon consideration of the application by the appellant, partly allowed the application. It held that his termination was substantially fair but procedurally unfair. Put differently, it held that the respondent had valid reasons to terminate the appellant but did not follow a fair procedure. As a relief, the High Court ordered a twelve months' compensation by the respondent for unfair termination in terms of section 40 (1) (c) of of the Employment and Labour Relations Act, No. 6 of 2004 (the Act). Still aggrieved, the appellant has come to this Court on three grounds of complaint, that is:

1. That the Labour Court Judge erred in law in not reinstating the appellant after having held that the termination of the appellant was made by the Respondent's Managing Director's Human Resources Disciplinary Committee of which had no disciplinary authority over the appellant;
2. That the Labour Court Judge erred in law in holding that the termination was substantively fair while the whole disciplinary proceedings and termination reached thereof were a nullity as the

disciplinary authority which terminated the appellant was improper, and lacked disciplinary authority over the appellant; and

3. That the Labour Court Judge erred in law in granting the appellant only 12 months as compensation instead of the all employment entitlements from the time the appellant was terminated up to the date of its decision.

In his written submissions, the appellant has sought leave of the Court to add another ground of appeal; that is:

4. The labour court Judge erred in law and misdirected herself in law in holding that the termination was substantively fair despite the appellant's credible and wealthy evidence that the NMB Circular of 2006 was not sent to NMB Temeke Branch and that the Appellant authorized payment of the cheques in dispute in accordance with both the NMB Circulars of 22nd June 2006 and of June 2007.

When the appeal was called on for hearing on 28.06.2021, neither the appellant nor his advocate entered appearance. The record had it that the appellant was served on 21.06.2021 through his advocate – Mr. Kenan Komba, learned advocate. Given the circumstances, Mr. Paschal Kamala, the learned advocate who appeared for the respondent bank, snatched the opportunity to pray for dismissal of the appeal in terms of rule 112 (1) of

the Tanzania Court of Appeal Rules (the Rules). However, upon mature reflection and after being prompted by the Court and the provisions of rule 112 (4) of the Rules brought to his attention, the learned counsel, as a true officer of the court, prayed to proceed with the hearing of the appeal in the absence of the appellant. We granted the prayer.

Mr. Kamala adopted wholly the reply written submissions earlier lodged with the Court by Mr. Juvenalis Ngowi, learned advocate, in response to the written submissions in support of the appeal filed by Mr. Komba, learned advocate. He, however, had little clarifications on some pockets. Clarifying, he submitted that there was fairness in terminating the appellant but that the ailment was on procedure. That the procedure for termination of the appellant was flouted in that the MDHRDC had no authority to terminate the appellant.

On the complaint by the appellant that he ought to have been reinstated the High Court having found that the procedure was contravened, Mr. Kamala argued that reinstatement could only be ordered if unfairness in both substance and procedure were proved. To buttress this proposition, the learned counsel cited to us rule 32 (1) and (2) of the

Labour Institutions (Mediation and Arbitration Guidelines) Rules - GN. No. 67 of 2007.

Mr. Kamala added that even assuming that the order for termination was not fair, reinstatement was not practicable as the respondent had lost confidence in the appellant. He added that since the appellant was employed in a banking industry, trust and confidence was of paramount importance and, as that was eroded, reinstating the appellant would not be practicable. To reinforce this argument, the learned counsel cited to us **National Microfinance Bank PLC v. Andrew Aloyce**, Revision No. 1 of 2013, an unreported decision of the High Court. He also cited **National Microfinance Bank PLC v. Elizabeth Alfred Khairo**, Revision No. 552 of 2018; also an unreported decision of the High Court to underscore the point that reinstatement was not a practicable aspect.

Having argued as above, the learned counsel prayed for the dismissal of the appeal.

We have considered the rival arguments by the learned advocates for the parties as they appear in their respective written submissions and as

clarified by Mr. Kamala at the hearing. Having so done, we go into the determination of the grounds of appeal straight away.

The first ground of appeal seeks to challenge the High Court for not reinstating the appellant after finding that the termination was made by a person without authority. Mr. Komba argued in the written submissions that the High Court, having found that the termination was *void ab initio*, the course of action to follow should have been to reinstate the appellant. Mr. Komba cited adequate case law on termination of an employee by an authority which has no jurisdiction so to do. Such decisions include **The Attorney General of the United Republic of Tanzania v. African Network of Animal Welfare**, Appeal No. 3 of 2011 (an unreported decision of the East African Court of Justice), **International Medical University v. Eliwangu Ngowi**, Revision No. 54 of 2008 (an unreported decision of the High Court), **Mugwebe v. Seed Co. Ltd and Another** 2000 (1) ZLR 93 (S) quoted with approval in **Geddes Limited v. Mark Tawonezvi**, Judgment No. 34/02 of the Supreme Court of Zimbabwe and **Nazir Chafeker v. CCMA and Others**, Case No. C 568/12 (the decision of the Labour Court of South Africa).

On the authority of the above case law, Mr. Komba submitted that once termination is a nullity, that decision must be taken to be *void ab initio* and that any enquiry into its fairness by the reviewing arbitrator or court is precluded. He argued that the High Court erred in enquiring into substantive fairness of the termination having held it to be *void ab initio*. It ought to have ordered a reinstatement in favour of the appellant without any loss of his remunerations, the learned counsel argued in conclusion of the first ground of appeal.

On the other hand, Mr. Kamala argued that termination of employment by an employer will be considered to be unfair if the employer fails to prove that termination was with valid and fair reasons; that is substantively and procedurally fair. The learned counsel added that, in terms of section 40 (1) (a), (b) and (c) of the Act, if an arbitrator or court finds termination to be unfair, he may order reinstatement, reengagement or pay compensation to the employee of not less than twelve months' remuneration. Mr. Kamala added that despite the fact that the remedies are vested in the arbitrator or the court, only one of the three can be ordered. He argued that it is a settled law of procedure in our jurisdiction that where termination of employment is found to be substantively fair but

procedurally unfair, the arbitrator or court should order payment of compensation instead of reinstatement without loss of remuneration. Premising his arguments on the foregoing submissions, Mr. Kamala contended that the High Court did not err in not ordering a reinstatement of the appellant. He concluded that, having found and held that termination was procedurally unfair contrary to section 37 (2) (c) of the Act but substantively fair in accordance with section 37 (2) (a) and (b) of the same Act, the High Court did not err in awarding the appellant a relief under section 40 (1) (c) of the Act. The learned counsel thus implored us to dismiss this ground for want of merit.

We have considered the rival arguments on this ground by the learned advocates for the parties and accorded them the weight they deserve. This ground is intertwined with the third ground. We shall consolidate these two grounds in their determination.

The learned advocates for the parties, at least for these grounds, do not seriously dispute the findings of the High Court. What is at issue, it seems to us, is the relief awarded. While the appellant's counsel submits that the High Court ought to have ordered a reinstatement without any loss of remuneration, the respondent's submits that a relief under section

40 (1) (c) of the Act was apposite. We think the respondent's counsel is right in his submission that an order under section 40 (1) (c) of the Act was appropriate. We shall demonstrate.

We start with an understanding that the remedies for unfair termination which was the complaint of the appellant are provided for under section 40 (1) of the Act. For easy reference we undertake to reproduce it hereunder. It reads:

> *"**40.**-(1) If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer-*
>
> *(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or*
>
> *(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or*
>
> *(c) to pay compensation to the employee of not less than twelve months' remuneration."*

We also wish to underscore that the reliefs provided under the provisions of section 40 (1) of the Act just reproduced above are meant to

be given disjunctively and not conjointly. We say so because the subparagraphs (a), (b) and (c) of subsection (1) of section 40 of the Act are separated by the word "or"; not "and". This connotes that the reliefs can be granted disjunctively. We had an occasion to discuss the tenor and import of section 40 (1) of the Act in **National Microfinance Bank v. Leila Mringo and 2 Others**, Civil Appeal No. 30 of 2018 (unreported). In that case, we observed that the word "or" in the subsection means that one of the options in (a), (b) or (c) may be ordered. In the light of section 2 (2) (a) of the Interpretation of Laws Act, Cap. 1 of the Revised Edition, 2002 (now 2019); the Court must construe and interpret the provisions of law in a plain and ordinary meaning unless the context of the Act is inconsistent with such application. Likewise, the provisions of section 13 of the same Act emphasizes the point that when the words "are", "or" and "otherwise" are used, they should be construed as meaning disjunctively not conjunctively.

We agree with Mr. Kamala that in view of the fact that the appellant was employed in the banking industry in which trust and confidence were of paramount importance, the relief given by the High Court was the most

reasonable in the circumstances. In **NMB Bank PLC v. Andrew Aloyce** (supra) the High Court was faced with an identical scenario and observed:

> *"... The applicant is in the banking industry, where honesty by its employees is its key stock in trade; without it, its business would collapse with dire consequences, not only to the employer and its other employees, but also to the economy at large. It is true therefore, that the nature of the bank's demands a unique degree of honesty from its employees, such that, any show of dishonesty amounts to a grave misconduct and may be sanctioned more severely than if it is committed in any other less* ***honesty sensitive*** *industry."*

We subscribe to the above holding of the High Court and endorse it as a correct position of the law in our jurisdiction. It would be unrealistic to reinstate the appellant who was found by the respondent to be marred with dishonesty after having been convicted of gross misconduct and failure to perform duties to the standard required and in whom the respondent had lost confidence. As we observed in **Leila Mringo** (supra) when grappling with an akin issue:

> *"It is undeniable that the business in which the respondents were engaged requires unqualified*

good faith .... Acts that impair good faith such as dishonesty or deception may easily be construed as gross misconduct and warrant termination of employment."

In **Elizabeth Alfred Khairo** (supra) the High Court expressed similar sentiments, to which we also subscribe, in difficulties of reinstating an employee in a banking industry in the following terms:

"... I have taken seriously circumstances in which the dispute arose. To reinstate the respondent will not be in the best interest of the applicant and financial institutions at large. Respondent is a bank doing banking business. Any misunderstandings with its employees is dangerous to the well-being of the Bank ...."

Mr. Komba cited several authorities purporting to support his proposition that the High Court ought to have reinstated the appellant. With unfeigned respect to Mr. Komba, the authorities cited have no direct bearing on the case under discussion. Despite the fact that the cases cited have no binding effect on us, they are authorities for the position that termination made by a person or body without authority amounts to unfair termination.

Given the above discussion, we find nowhere to fault the High Court in not reinstating the appellant and awarding him the relief under section 40 (1) (c) of the Act. The first and third grounds of appeal are without merit and dismissed.

We now turn to consider the second ground of appeal which seeks to challenge the High Court for holding that the termination was substantially fair while the appellant was terminated by a body without authority. Mr. Komba's submission on this ground of appeal is rather misleading in that the learned counsel has burnt a lot of fuel in arguing that the appellant was double jeopardized. Be it as it may, he contended that the appellant was charged twice on the charges based on the same facts which amounted to putting the substantive fairness of termination at stake. He argued that the decision of the chairperson of the MDHRDC of 29.06.2010 which acquitted the appellant and later on 08.10.2010 terminating him on the strength of disciplinary offences based on the same misconduct and facts double jeopardized the appellant. The learned counsel concluded that the disciplinary proceedings of both 29.06.2010 and 07.10.2010 were a nullity in that the chairperson who initially acquitted the appellant and

subsequently convicting him was not clothed with disciplinary authority over the appellant.

On the other hand, Mr. Kamala reiterated his arguments on the point in the first ground of appeal that in terms of section 37 (2) (a), (b) and (c) of the Act, fairness of termination is based on reason for termination and the procedure used for such termination. He stressed that termination must be valid and fair and that the procedure for termination must be followed. He argued that while procedure for termination may be faulted, the CMA and High Court are still legally entitled to decide on the validity of the reasons for termination. The employer, he argued, must prove that the termination was with valid and fair reasons and that the procedure was followed. He argued further that the law does not say where the termination is found to be procedurally unfair it will automatically be substantively unfair, or vice versa. He concluded that the fact that the procedure for termination was null and void, does not make the reasons for termination to be invalid. He thus prayed for dismissal of the second ground of appeal for being without merit.

The determination of this ground of appeal will not detain us much. We think there are two sub-issues to be determined here. First is whether

the appellant was double jeopardized in the conduct of disciplinary proceedings and secondly, whether the MDHRDC had jurisdiction to terminate the appellant. As good luck would have it, the High Court discussed these two complaints at length and found them to be merited. With regard to the complaint on double jeopardy, the High Court discussed what it entails and cited **Bhengu v. Union Cooperative Ltd** (1990) 11 ILJ 117 (LC) A-B 121 and **Theewaterskloof Municipality v. Independent Municipality & Allied Trade Union on Behalf of Visagie** (2012) 33 ILJ 1031 for the position that it is unfair for an employer to set aside a first disciplinary hearing and subject the employee to the same charges. Having so observed, the High Court concluded at p. 535 of the record that the complaint on double jeopardy had merit.

Respecting the complaint on whether the MDHRC had jurisdiction to terminate the appellant, the High Court discussed the complaint and found it to be meritorious. The High court relied on para 9.5 of the NMB Human Resources Policy of March 2009 (Exh. PW1) which for easy reference we reproduce the relevant part hereunder:

> *"... The decision to terminate employee will be taken by the Chief Executive Officer in the case of Heads of Head Office Departments, Zone Managers,*

Branch Managers, and other Managers. The Managing Director's Human Resources Disciplinary Committee (MDHRDC) will be responsible for terminating staffs who are non-manageriai at Head Office...."

With the above provision in mind, the High Court concluded at p. 536 of the record:

"... the decision to terminate the applicant which was made by the Chairperson of the Managing Director's Human Resources [Disciplinary Committee (MDHRDC)] as evidenced in the letter of 8th October, 2010 contravened paragraph 9.5 of the NMB Human Resources Policy of March 2009 and rendered the decision to terminate the applicant null and void ab initio .... Therefore this ground has merit...."

In view of the above, we cannot but wonder why Mr. Komba is bringing before us the same complaints which the High Court decided in his favour.

We are aware that Mr. Komba had another angle of his argument; that, as the proceedings which terminated the appellant were null and void *ab initio* the CMA and High Court ought not to have gone into the

substantive nature of the termination. With unfeigned respect to the learned advocate, we are not prepared to swim his current. Instead, we agree with Mr. Kamala that the finding that the termination was procedurally unfair, does not hinder enquiry into whether the termination was justified. We find and hold that the High Court was justified in enquiring into the substantive nature of the termination and was correct to find and hold that the termination was substantively fair. We find the second ground of appeal wanting in merit and dismiss it.

The fourth ground of appeal faults the High Court for holding that the termination was substantively fair despite the appellant's credible and wealthy evidence that the NMB Circular of 2006 was not sent to NMB Temeke Branch and that the Appellant authorized payment of the cheques in dispute in accordance with both the NMB Circulars of 22nd June 2006 and of June 2007. With unfeigned respect, we are not prepared to go along with Mr. Komba. What the appellant is bringing to the fore here is that he was not aware of the guiding principles in his employment. He is, in effect pleading ignorance of them. Like ignorance of the law, ignorance of circulars governing the day to day activities of the appellant, is not and cannot be a defence. One wonders how the appellant, a person in the

managerial cadre (a Customer Service Manager), managed to perform his duties without those guiding principles. If anything, we think, as the appellant claims to have been unaware of the guidelines because they were not sent to his branch, he ought to have proved that assertion. It is an elementary principle of evidence that the one who alleges must prove. It was thus incumbent upon the appellant to prove that the guidelines were not supplied to the branches of the respondent. The law is settled in this jurisdiction that he who wants the court to consider that a certain fact exists, has the burden of proving that fact – see: **Geita Gold Mining Ltd & Another v. Ignas Athanas,** Civil Appeal No. 227 of 2017, **Paulina Samson Ndawavya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 and **Dr. A. Nkini & Associates Limited v. National Housing Corporation**, Civil Appeal No. 72 of 2015 (all unreported).

In the current appeal, we are afraid, the appellant failed to prove before the CMA and before the High Court as well as before us that he was not aware of the circulars guiding him in how payments of cheques should be dealt with. His assertion that he called the issuers of the relevant cheques was found by the CMA and the High Court to have not been proved. We also agree that the allegation was not proved by the appellant

who had that burden to so prove. We therefore dismiss the fourth ground of complaint as well.

For the reasons we have endeavoured to assign, we find the appeal barren of merit and dismiss it. This being a labour-related matter, we make no order as to costs.

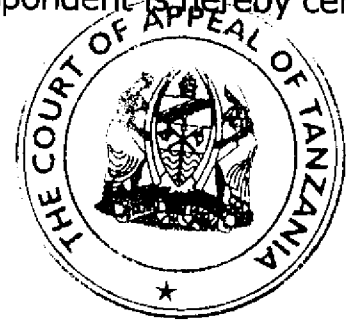
DATED at **DAR ES SALAAM** this 25th day of April, 2022.

J. C. M. MWAMBEGELE
JUTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 29th day of April, 2022 in the absence of the Appellant and the presence of Mr. Paschal Kamala, learned counsel for the Respondent is hereby certified as a true copy of the original.



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DEPUTY REGISTRAR
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