IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

TANGA DISTRICT REGISTRY

AT TANGA

LABOUR REVISION NO. 2 OF 2022

(ORIGINAL CMA/TAN/40/2021/15)

UPENDO MWASINDILA.....APPLICANT

VERSUS

NMB PLC BANK.....RESPONDENT

JUDGEMENT

Date of Judgement: 21ST OCTOBER 2022

L. MANSOOR, J

The Applicant, Upendo Mwasindila, was an employee of NMB PLC, the Respondent herein. She was employed on 05/3/2009 as a Bank Teller Grade 3 and at the time of her termination she was a Relationship Officer at Madaraka Branch. She was terminated on ground of gross misconduct for two reasons; Involving in handling loans at Mkwakwani branch while there was an order to stop lending, the other reason is concealing information regarding customers who were rejected loans at

Madaraka branch with intent to mislead or defrauding the bank.

Dissatisfied by the termination, the Applicant filed a claim at the Commission for Mediation and Arbitration (to be referred as CMA) claiming for unfair termination both substantively and procedurally.

The CMA ruled out in favour of the respondent. The applicant was aggrieved by the award of the CMA, hence this application for revision by levelling a total of seven (7) legal issues reproduced hereunder;

1. *Whether the Hon Arbitrator rightly relied on Exhibit D1 in concluding positively the applicant's termination in the absence of legal colour of Rule 12 (1) (b) (1), (ii), (iii), (iv) and (v) of ERLA, GN 42 of 2007.*

2. *Whether the Hon. Arbitrator was correct to hold that the applicant had processed loans while on 'zuio' to LILIAN MOHAMED MCHIMILA and DEMETRIE THOMAS GIBURE.*

3. *Whether the Hon Arbitrator properly destinated to shift the burden of proof of the dispute from the respondent to the applicant.*

4. *Whether the Hon. Arbitrator rightly proceeded in not determining as to whether MADARAKA NMB PLC falls under the same bowl with MKWAKWANI NMB PLC at in terms of legal entity as far as contractual relationship to the Applicant is concerned.*

5. *Whether the Hon. Arbitrator properly directed herself to hold that the applicant failed to disclose to MKWAKWANI BANK loans information applied by FADHILI GODA, ZIADA SHENYANGWE and JOROME MMASSY while as such the applicant was working at MADARAKA NMB BANK PLC and had no formal knowledge over the loans.*

6. *Whether the Hon. Arbitrator properly directed herself on landing and deciding on the purported charges on gross dishonesty while such charges were not part of investigation report, charge sheet, evidence and or reasons of termination whatsoever, in the dispute.*
7. *Whether the Hon. Arbitrator was correct and or properly directed herself and hence concluding basing on hearsay evidence of DW1, DW2, and DW3.*

The matter was disposed by way of written submissions and each party dully complied. The applicant was represented by Mr. David Kapoma (PR) while the respondent enjoyed the

service of the learned counsel Sabas Shayo of Vertex Law Chambers.

I would start by saying that it was not an easy task going through the submissions of both parties. The applicant never argued the grounds categorically. In fact, the mode of submission was totally informal. Though the applicant, in her rejoinder, notified the court that the submission was in two wings, however the same could not assist. I could not easily grasp each specific ground in argument. The argument was random and this in fact affected the respondent's counsel whom altogether assumed the mode of the applicant. I therefore recall and advice the legal representatives to refrain from this vague and archaic way of submissions.

The applicant commenced by arguing that the Honourable Arbitrator entirely relied on Rule 12(3) (a) without considering Rule 12(1) (b), (i), (ii), (iii), (iv) and (v) of the ELR (Code of Good Practice) Rules GN 42 of 2007. He also submitted that it was pertinent for the whistle blower to testify at the disciplinary hearing and at the CMA.

He further says, since NMB Mkwakwani and NMB Madaraka are different entities, there was no cogent evidence to prove whether NMB Mkwakwani made a complaint to NMB Madaraka on the alleged charges against the applicant. The applicant argues that the evidence was purely hearsay as none of any NMB Madaraka officers was summoned to testify at the disciplinary hearing hence a contravention of Rule 25(1) ELR of GN 67/2007 read together with section 62(1) (a), (b), (c) of the Evidence Act CAP 6 R.E 2022.

The applicant also complains that since Exhibit D13 (Investigation Report) reveals that the applicant committed the misconduct with other five (5) fellow staffs officers, the respondent ought to have punished them all but unexpectedly only the applicant was charged and terminated, an act contrary to Rule 12(5) of the ELR GN 42/2007.

The applicant also complains that, since the misconduct was committed at NMB Mkwakwani yet, there was no documentary evidence from NMB Mkwakwani to prove the allegations against the applicant. The applicant therefore says

fall of this, it cannot be proved that the applicant processed loans to LILIAN MOHAMED MCHIMILA, DEMETRIE THOMAS GIBURE, FADHIL GODA, ZIADA SHENYANGE and JEROME MMASSY.

The applicant further says, since DW3, Victor Lucas Msofe was a victim, under Exhibit D13, for committing misconduct in line with the applicant, he was not summoned at the disciplinary hearing hence contrary to Rule 13(5) of the ELR GN 42/2007. The applicant submits that parties are mandatorily required to give evidence during disciplinary hearing and when it comes to CMA, it is catered for scrutinizing what had happened during the disciplinary hearing.

The applicant submits that charges against the applicant ought to have been shown on the face of Exhibit D3 (Charge Sheet) and not on Exhibit D1 (Human Resource policy Manual). Exhibit D3 is silent on gross dishonesty. The applicant therefore claims that the Hon. Arbitrator assumed the powers of interpreting Exhibit D3 while it was the duty of

the respondent. It is therefore the applicant's view that termination on gross misconduct was a misconception as it was not part of the charges in the investigation report.

The applicant cited the case of **National Microfinance Bank vs. Victor Modest Banda Civil Application No. 29/2018 CAT at Tanga** to demonstrate how allegations on unfair termination are handled in line with Rule 12 of ELR GN 42/2007. At page 13 the Court held;

> *'It is common ground that the appellant under Rule 12(1) (iv) (v) (2) (3) (4) and (5) of the code of good Practice was required, among others to prove, one whether the mistake done by the respondent amounted to serious misconduct, two, whether the disciplinary procedures were complied with and three, whether the sanction imposed against the respondent has been consistently applied to other employees who committed the same mistake'.*

Subjected to the above holding, it is the applicant's submission that the respondent did not prove as commented.

Submitting on paragraph 13(iii) of the affidavit, the applicant raised concern on procedural irregularities to the

effect that the whistle blower information was relayed on 17/4/2018 (exhibit D10 and D2). The investigation was made on 2/1/2018 prior to the effective date. And that the very report is not signed therefore not known whether it was executed by the proper authority. And at page 27 of the CMA award, the Hon. Arbitrator said;

> *"Katika hoja hii tumeona hakuna mahala popote katika Ushahidi wa mlalamikaji ambapo ameweka wazi kuwa ni kwa namna gani taratibu zilikiukwa....."*

The appellant submits that the Arbitrator ought to have verified the documents for authenticity so as to quinch the thirsty of section 88(4) of the ELRA CAP 366 RE 2019 failure of which weakened the applicant's rights to be heard.

In reply learned advocate for the respondent submitted that the arbitrator was correct to hold that the applicant was fairly terminated. There was concrete evidence from D1, DW2 and DW3 that proved the allegations and at the disciplinary hearing (exhibit D9) the applicant admitted some of the

offences charged with; that she confirmed that she did not ask permission from her line manager at Madaraka to process the said loans while she was at stop lending.

The respondent further submitted that the offences which the applicant was charged with are punishable by termination. He referred the court to Human Resource Policy Manual 2015 (Exhibit D1) where concealing information with intent to defraud the Bank is punishable by termination.

The learned counsel also says, under Rule 12(3)(d) of GN 42/2007 an employer, though being a first offender, may be terminated when it is proved that the misconduct is so serious that it makes a continued employment relationship intolerable.

To buttress this legal position, he cited the cases of **Edna Robert vs. Tanzania Revenue Authority, Labour Court Cases Digest [2011-2012] [16], Aziz Ally Aidha Adam vs. Chai Bora Ltd LCCD No. 65** where the court held that though the offence committed by the employee was the

first one but the circumstances of the case amounted to gross misconduct.

The counsel further submitted that the core value of banking industry is integrity, trust and confidence. Therefore, the employee is expected to exercise high degree of honesty, integrity and trust. The employer in this case lost trust with the applicant because she was aware of her obligation but neglected to heed the same.

He cited the case of **NMB Bank PLC vs Andrew Aloyce, HC (Labour Division) at Musoma [2013] [84]** where the court held;

> *"The applicant is in the banking industry where honesty by its employee is the 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 grave misconduct and may be sanctioned more severely than if it committed in any less honesty sensitive industry".*

Arguing on the consideration of Rules 12(1) (b), (i), (ii), (iii), (iv) and (v), 12(3) and 12(5) of the Code of Good Practice GN 42/2007. The counsel stated that the applicant's arguments are baseless as the applicant merely cited the Rules but failed to show its applicability.

Regarding the issue of the whistle blower and the issue raised in the investigation report (Exhibit D-13), it is the counsel submission that these issues were not cross examined by the applicant at the CMA. The counsel says it is unprocedural to raise new issues at this Revision stage.

To support his argument, he cited the case of **Paul Yustus Nchia v. National Executive Secretary Chama cha Mapinduzi, Civil Appeal No. 85/2005 CAT at Dar es Salaam (unreported)** where it was held;

> *A party who fails to cross- examine a witness upon a particular matter in respect of which it is proposed to contradict him or impeach his credit by calling other witnesses, tacitly accepts the truth of the witness's evidence in chief on that matter, and will not thereafter be entitled to invite the jury to*

disbelieve him in that regard. The proper course is to the witness while he is in the witness – box or, at any rate to make it plain to him at that stage that his evidence is not accepted'

The learned counsel also stated that under section 9 (1) and (2) of The Whistle blowers and Witness Protection Act CAP 446 R.E 2022 the respondent was forbidden to bring the whistles blower as a witness at disciplinary hearing.

On the issue of hearsay, the counsel submitted that the argument is very weak because NMB is one. NMB branches cannot be two different entities merely by being branches as they all serve in the name of NMB.

He says according to the nature of the charges against the applicant, all the respondent's witnesses were competent to testify. DW1 was the Human Resource, DW2 was the investigator and DW3 was the applicant's branch manager at the time of the misconduct.

Regarding the others staffs not charged, the counsel replied that only Philipina Tarimo was featured at CMA. The rest were not featured therefore being a new issue and when DW2 was cross examined in respect of the measures taken against Philipina, he replied that she was charged and the disciplinary hearing committee decided that she be demoted from Relationship Officer to a normal Bank Officer.

He further argued that since the rest were not featured at CMA, raising the same at this stage is unprocedural and will prejudice the respondent as the witness cannot be recalled to testify on the said issue. He cited the case of **Hotel Traveltime & 2 others v. National Bank of Commerce Limited [2006] TLR 133** where the Court held that;

> *'As a matter of principle an appellate Court cannot take matters not taken or pleaded in the court below'.*

The counsel also stated that the case of **NMB v. Victor Modest Banda (supra)** is inapplicable in the present case as the applicant failed to demonstrate how the cited provision was not achieved and how the same relates with the evidence available on record.

The counsel finally concluded that the respondent followed all the procedures stipulated by the law before terminating the applicant. The counsel therefore prays this Court to dismiss this application with costs for being devoid of merits.

In rejoinder, the applicant insists that by virtue of section 3 of the Banking and Financial Institution Act No. 5 of 2006 read together with section 13(3) of the same Act, NMB Madaraka has a different entity to NMB Mkwakwani. The applicant therefore reiterates that since the root cause arose from NMB Mkwakwani, the charge was to be proved from NMB Mkwakwani and not NMB Madaraka.

The applicant further maintained that failure to summon the whistle-blower prejudiced the applicant. The applicant

again states that even if the law protects the whistle blower, then the one who received the information should have testified so as to cement or validate the existence of such information.

The applicant also stated that the case of **National Microfinance Bank v. Victor Modest Banda (supra)** is relevant as the Arbitrator violated Rules 12(1) (b), (i), (ii), (iv) and (v) of GN 42/2007. The investigation report under rule 13(1) of GN 42/2007 was not anchored under exhibit D3 and therefore exhibit D11 and D12 did not reflect reasons of gross misconduct.

The applicant finally prays this court to find merit in this revision and order reinstatement without loss of emoluments.

As I said early, parties never submitted chronologically on all the seven legal issues to be resolved. The arguments were random. However, from the records, and the arguments raised by both parties, I found three issues to be resolved?

1. Whether the applicant was fairly terminated?
2. Whether the procedures for termination was lawful.

3. If not what relief if the applicant entitled.

According to section 37(2) (b) (i) (ii) and (c) of the Employment and Labour Relation Act for a reason for termination to be fair it must be related to the employee's conduct, capacity or compatibility or based on the operational requirements of the employer and that the termination must be in accordance with a fair procedure.

It is true as said by the applicant that it is the charge sheet that indicates the offences against an employee. However, I cannot I agree with the appellant that the charge sheet never depicted the offence of gross misconduct.

Exhibit D3 is the disciplinary charge sheet. The offences charged are two and I wish to reproduce them;

1. *Violation of clause 1.9 of section 15.15 of the schedule of the offences as provided for in the Human Resources Policies Manual 2015 by failure to comply with established procedures and/or standing instructions where u continued handling loans at Mkwakwani branch while you were stopped lending.*

2. *Violation of clause 7.8 of section 15.15 of the schedule of the offences as provided for in the Human Resources Policies Manual 2015 by concealing information regarding customers who were rejected loans at Madaraka Branch with the intent to mislead and/or defraud the bank.*

It should be noted that what amounts to gross misconduct is an act which is so serious that makes a continued employment relationship intolerable and once proved can justify termination even if being the first offence committed by an employee.

Rule 12(3) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 GN. 42/2007 has set out six acts which may justify gross misconduct, namely; gross dishonest, willful damage to property, willful endangering the safety of others, gross negligence, assault on a co-employee, supplier, customer or a member of the family of, and any member associated with, the employer and gross insubordination.

Having a look at Exhibit D1 (Human Resources Policy Manual 2015) and the evidence on record am satisfied that the respondent proved the offence of gross misconduct.

The applicant being an employee of the bank, honest is paramount. At all-time an employee must act in good faith otherwise the bank's business may collapse with terrible consequences not only to the bank and its other employees, but also to the economy at large as was held in **NMB Bank PLC vs Andrew Aloyce (supra).**

I concur with the finding of the CMA that there is ample evidence that the applicant was stopped lending (Exhibit D4). She was stopped as at 24/5/2017 and resumed on 01/12/2017 (Exhibit D6). There is also evidence that on 16/11/2017 she processed a loan of Tshs. 6,000,000 to one Lilian Mohamed Mchimila and Demetria Thomas Gibure Tshs 3,000,000 on 17/11/2017. The applicant never disputed on this fact but only asserted that she was given permission by her line manager but never availed the evidence to prove the same.

From the record the respondent only tasked her to train her fellow new employee one Philipina Tarimo at Mkwakwani on how cregora works and not to process the loans to customers while knowing she was stopped. Even at the disciplinary hearing she also admitted to have processed the two loans.

As to issue of concealing information in relations to customers who were rejected loans at Madaraka Branch, it is true that Fadhila Goda and Edward Jerome Mmassy were rejected loan customers at Madaraka but they subsequently and eventually secured loans at Mkwakwani Branch.

It should be noted that at this time the applicant had resumed loan lending. On 2/1/2018 the applicant reviewed and signed an independent report of visit of one Fadhila Hassan Goda (Exhibit D10) and on 4/1/2018 Fadhila Hassan Goda secured a loan of Tshs.20,000,000 and on 1/2/2018 Edward Jerome Mmasy Tshs. 30,000,000.

The applicant failed to discharge her duty of honesty and integrity. She was duty bound to disclose the information. The applicant had the information as by then she was no longer

under stop lending. She signed exhibit D10 while working at Madaraka Branch. She was aware that the two customers were rejected loans.

The argument by the applicant that the Arbitator did not consider Rule 12(1) (b), (i), (ii), (iii), (iv) and (v) is a misconception. The cited rules provide guidance on how allegation on unfair termination is to be handled. The case of **National Microfinance Bank vs. Victor Modest Banda (supra)** gives a clear interpretation on the application of the said Rule. I am of the settled view that the Hon. Arbitrator correctly applied the rules properly. The respondent, among other things proved that the mistake by the applicant amounted to serious misconduct worth punishable by termination.

The contention by the applicant that the evidence is based on hearsay is also baseless. The applicant should also note that NMB is one entity incorporated under the Companies Act 2002. The fact that it operates in various branches does not denote that the branches are distinct entities.

When the applicant was at first employed on 5th March 2009, she signed the employment agreement with NMB Ltd, an employer, with its Head Office at Dar es Salaam. She never signed with one of its branches.

And when the whistle blower relayed the information, it was the NMB bank and not its branches that made the inquiry. Even the witnesses, before the CMA, testified as employees of the respondent; DW1 was the Human Resources and business partner, DW2 was the senior credit assurance officer – head office and DW3 was the applicant's branch manager. Therefore, the argument by the applicant that NMB Mkwakwani never made a complaint to NMB Madaraka regarding the alleged charges against the applicant is a misconception. It is also a misconception that the cogent evidence should have come from NMB Mkwakwani. The investigation report (Exhibit D13) clearly illustrates how the respondent reacted on the whistle blower's information. A thorough investigation was conducted in the two branches

(Mkwakwani and Madaraka) hence resulting into the two charges against the applicant.

The fact that the whistleblower was not called to testify does not erode the credibility and the weight of evidence adduced by the respondent. The evidence on record is sufficient enough. This being a labour matter, the test is on balance of probabilities and not beyond reasonable doubt. See the case of **Tropical Pesticides Research Institute v. Sebastian F. Mlingwa (2015) LCCD 212.** With due respect I find nowhere on record that the arbitrator shifted the burden of proof from the respondent to the applicant. Therefore, the applicant's argument on this legal issue is also unfounded.

It is true that the investigation report (Exhibit D13) reveals that the investigation was in deed in respect of the applicant together with five staff members namely Philipina Tarimo (RO) at Mkwakwani branch, Zamda Salum Rashid (RO) at Madaraka, Christine Gyunda (RO) at Madaraka branch, Olivo Tossi (BM) at Mkwakwani branch and Victor Lucas Msofe (BM) Madaraka brank. It is therefore the contention by the

applicant that charging the applicant alone contravened Rule 12(5) of the ELR GN 42/2007.

The rule requires the employer to apply the **sanctions of termination** consistently as between two or more employees who **commit the same misconduct**.

I have gone through the entire investigation report and observed that following the inquiry, there were four specific recommendations. Among them was; that disciplinary actions should be taken against the involved staff as the management shall deem fit.

As much as I understand the purpose of conducting an investigation is to ascertain whether there are grounds for a hearing to be held. With this in mind it was the reason why the investigative machinery recommended that disciplinary actions should be taken against the involved staff as the management shall deem fit.

The applicability of rule 12(5) of the ELR GN 42/2007 comes in after the outcome of the hearing and the purpose is to discourage favoritisms/discrimination and encourage

uniformity and equality. I wonder if the rule can be applied at the investigation stage. Sanctions are always after hearing stage and not at investigation stage. I therefore rule out that rule 12(5) was not contravened.

In the ultimate I find this application for revision being baseless. The CMA award was fair and reasonable. Having reasoned as said, the revision is dismissed with no orders as to costs and the CMA award is confirmed.

DATED AND DELIVERED AT TANGA THIS 21ST DAY OF OCTOBER 2022

LATIFA MANSOOR

JUDGE

21ST OCTOBER 2022