IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 386 OF 2022

(Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni dated 30th day of September 2022 in Labour Dispute No. CMA/DSM/ILA/95/2021/46/2021 by (Mbena: Arbitrator)

NATIONAL BANK OF COMMERCE..... APPLICANT

VERSUS

MATHIAS RAYMOND MUJUAMUNGU.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

17th March 2023 & 29th March 2023

This application for revision arises from the award of the Commission for Mediation and Arbitration of Dar es Salaam, Ilala (CMA) delivered by Hon. Mbena, M.S., Arbitrator, dated 30th day of September 2022 in **Labour Dispute No. CMA/DSM/ILA/95/2021/46/2021**. The Applicant (former employer of the respondent) is praying for this Court to call for the record of the proceedings of the CMA in the aforesaid Labour Dispute, revise, and set aside the award therein due to material irregularities and errors in the exercise of the Commission's jurisdiction. The Applicant is further praying for the cost and any order or relief as the Honourable Court may deem fit and just to grant.

From what is extracted from the CMA record, as well as the affidavit and counter affidavit filed by the parties, the respondent was employed by the applicant as a Forensic Investigator effective from 04th December 2009 under a permanent terms contract. Sometimes in 2020 the Respondent was assigned to investigate a fraud incident alleged to have involved Peertech Company Limited in loan scheme approval and processing.

The Respondent prepared three different reports. The initial reports did not discover fraud but the report that followed discover fraud. The Applicant considered the first failure of discovery of fraud as a failure of duty on the part of the Respondent as a fraud investigator and commenced disciplinary processes against the Respondent.

After the disciplinary hearing, the respondent was found guilty of gross negligence for failure to conduct and prepare a comprehensive investigation report. These findings led to the termination of the Respondent from the employment.

Being aggrieved by the employer's decision to terminate his employment, the respondent filed the **Labour Dispute No. CMA/DSM/ILA/95/2021/46/2021** claiming to be compensated to the tune of 2 years monthly remuneration, totalling **TZS 120,000,000.00** for unfair termination, and for **TZS**

100,000,000.00 as damages for malicious prosecution, **TZS 500,000,000.00** as general damaged for personal carrier disrepute; plus other terminal benefits as per CMA Form No.1 which are golden handshake benefits, severance pay, written withdrawal of unfounded charges, certificate of service and benefits as per the contract.

In the CMA, the arbitrator found the reasons and procedures for the respondent's termination to be not fair. The arbitrator awarded the Respondent 24 months remuneration as compensation totalling to **TZS 174,644,646.00**, damages for personal carrier disrepute to the tune of **TZS 100,000,000.00**, and severance allowance to the tune of **TZS 19,591,530.00**. All these were summed up to **TZS 294,236,176.00** as compensation for unfair termination. The Applicant was further ordered to issue to the Respondent a certificate of service. This is what aggrieved the applicant triggering this application for revision.

Along with the Chamber summons, the applicant filed an affidavit sworn by Ms. Gladness Mugisha the applicant's Principal Officer, in which after expounding the chronological events leading to this application, aasserted the respondent to have been fairly terminated substantively and procedurally. Paragraph 10 of applicant's affidavit contains four legal issues as reproduced hereunder: -

1. Whether the arbitrator erred in law and fact for declaring that the termination was substantively unfair
2. Whether the arbitrator considered the reasonableness and legality of the amount awarded as compensation to the respondent.
3. Whether the arbitrator considered the reasonableness and legality of the amount assessed and awarded as general damages to the respondent.

The application was challenged by the respondent's counter affidavit sworn by the Respondent, Mathias Raymond Mujuamungu. The deponent of the counter affidavit vehemently disputed the applicant's assertion that he was fairly terminated. All the Applicant's material allegations in the affidavit are disputed by the Respondent in the counter affidavit.

The application was disposed of by a way of written submissions. The submissions of the Applicant were drawn and filed by Advocate **Wivina Karoli Benedicto from Brickhouse Law Associate**, and that of the Respondent by Mr. Sylivatus Sylivanus Mayenga, Advocate from a firm named **West End Law Group Advocates**. I appreciate their rival submissions which will be considered in determining this application.

In submitting on the substantive fairness of the termination, Advocate Wivina stated that the Respondent was assigned to investigate the fraud incident relating to Peertech Company Limited group loan scheme approval and loan processing. She added that the Respondent prepared three different reports and all three reports were different and did not discover and identify the fraud. According to Advocate Wivina this was a strange outcome and failure of duty by the Respondent as a fraud investigator, because the Respondent ought to have uncovered the fraud which had been reported prior to his commencement of investigation.

According to Advocate Wivina, in the first investigation report issued on 10th June 2020 **(Exhibit D10 A)**, the Respondent did not meet the requirement or the scope of what he was assigned and this did not satisfy the Head of Retail credit named Edwin Urasa who stated that some issues were not properly addressed. According to Advocate Wivina, the report was misleading the Bank to proceed with the processing of Peertech's Applications for top Up loan, the act which could lead to another additional loss to the Bank. Advocate Wivina submitted that it was very wrong and unacceptable that the Respondent recommended in his report that the Fraudster be added a further loan despite being a fraud investigator. She stated that, it

was because of these shortcomings the Respondent was assigned to investigate further and prepare another report.

Advocate Wivina stated further that the Respondent prepared the 2nd Report dated 8th July 2020, tendered as **Exhibit D10 B,** which came with an outcome totally different from the 1st Report. This Report, according to Advocate Wivina, stated that Peertech company is suspicious hence the corporate guarantee is also suspicious with a recommendation that the Bank should not consider granting the top up nor add or extend the group loan to new borrower from this company. Advocate Wivina was of the view that the difference in the reports showed great respondent's negligence.

According to Advocate Wivina the Bank after noticing the contradictions in the 1st and 2nd Reports, asked the Forensic Investigations Unit to re-investigate the Peertech Company/loan and advice. It was submitted by Advocate Wivina that the 3rd report **(Exhibit D10 C)** found forgeries on the part of Peertech at the time of engagement and taking the loan and these findings were very different from the first report.

Advocate Wivina considered these circumstances to be good and valid reason to terminate the Respondent as the Fraud was a serious

matter which caused the Bank to suffer a huge loss of 4.13 billion shillings.

Regarding relief, Advocate Wivina finds the compensation of 24 months to be too far from the minimum compensation provided by **Section 40 (1) of Cap 366 of 2019** and without any assigned reason. In her view the arbitrator ought to exercise his jurisdiction judiciously in accordance with the principle in **Felician Rutwaza Versus World Vision, Civil Appeal No. 213 of 2019 CAT (Unreported)**.

Apart from disputing the award of 24 months compensation, Advocate Wivina further challenged the Arbitrator's award of **TZS 100,000,000.00** to the Respondent as general damages. She disputed existence of any tarnished image of the Respondent and submitted that what was done by the Respondent was wrong and in awarding damages, the CMA failed to consider that the bank had incurred the loss of TZS 4.3 billion Shillings.

According to Wivina, the Respondent has not proved that he suffered any injury which is supposed to be redresses by damages. She prayed for the award of damages to be set aside. She referred to the case of **UMICO Limited v Salu Limited, Civil Appeal No.91 of 2015, Court of Appeal of Tanzania at Iringa** where it was held:

"In view of the foregoing, we find the learned judge was wrong to enter judgement in favour of the respondent and award general damages. We set aside the award of TZS 100,000,000/= as general damages. For avoidance of doubt the respondent has no right to remain at the site"

Having gone through the parties' submissions and their sworn statements together with the record of the CMA, I find it appropriate to address two issues. The first issue is **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award** issued in Labour Dispute No. **CMA/DSM/ILA/95/2021/46/2021**. If the answer is affirmative then the second issue is, to **what reliefs are parties entitled?**

In resolving the issue as to **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award,** the three grounds of revision stated in the Applicant's affidavit will be considered basing on the facts that, they all fall under the ambit of one aspect of substantive fairness or fairness of reason. It is well understood that, for a termination of employment to be fair, there are national and international standards an employer should observe.

Internationally **Article 4 of ILO Termination of Employment Convention, 1982 (No. 158)** provides that the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operation requirements of the undertaking, establishment, or services.

Nationally, termination of employment is said to be fair if it complies with **Section 37 (2) (a) and (b) of the Employment and Labour Relation Act, Cap 366 R.E 2019** which provides that for the termination to be substantively fair, the reason for termination must be valid and fair connected to conduct, capacity or operational requirements. In the case of **Tanzania Revenue Authority V. Andrew Mapunda,** Labour Rev. No. 104 of 2014 High Court of Tanzania, it was held thus: -

> *"(i) It is the established principle that for the termination of employment to be considered fair it should be **based on valid reasons** and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment, Section 37(2) of the Act. 7 (ii) I have no doubt that the*

intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."

From the above legal position, termination of employment must be accompanied by valid and fair reasons and must follow fair procedure. In the CMA the arbitrator found that the termination was both substantively and procedurally unfair. In this Revision, in the Affidavit, the applicant opted to challenge only the fairness and validity of reason for termination could not see procedural aspects in the affidavit. This means, the holding of the CMA regarding procedure is not pleaded because it does not feature neither the chamber summons nor in the affidavit. The Applicant's counsel raised it in the submission. This being the case, little focus will be given to the procedural issues since it is not the main subject in the application.

Having contemplated the legal position on fairness of termination of employment, I will now embark to the framed issues by starting with the first ground of revision as to whether there were ***valid*** and ***fair*** reasons for termination of the Respondent's employment. In this matter, the respondent was terminated from his employment for allegedly having committed misconduct (gross negligence), contrary to the employer's policies. The arbitrator found the reasons to be

invalid and unfair. The finding was based on the fact that, the duty to conduct the forensic investigation reports was assigned to a team and not respondent alone.

The above holdings of the Arbitrator is challenged by Advocate Wivina who stated that the respondent failed to identify fraud and forgery and proceeded to advise the bank management to top up the loan. She contrasted the respondent's report with the other report which identify variances from previous report. On that basis she is of the view that there was a fair and valid reason of terminating respondent's employment.

On the other hand, Advocate Mayenga for the Respondent, submitted that all the three investigation reports were prepared by the team from the Investigation Department which was led by one Ngalagila Ngonyani who was the Head of the Fraud Investigation Unit and not by respondent alone and personally. He referred to the said reports in **Exhibits D - 10A, D -10 B and D - 10C.** He quoted a disclaimer indicated in every report with the following words:-

> "***The factual findings contained in this report represent our first best understanding of the matters covered at the date of this report. Should further***

investigation yield new or different information be discovered by us, or disclosed to us, this report will be updated accordingly'.

He stated further that all the reports were prepared by the instruction of the applicant's Management. He listed the names of the team members who did the investigations which are Ngalagila Ngonyani who was the Head of the Department and his Deputy one Meshack Shani, one Castor Mponela and himself, the Respondent. According to Mr. Mayenga penalizing the respondent individually for the task assigned to a team amounted to discrimination.

Mr. Mayenga continued to submit that all the reports were being carried out under different scopes as provided, and there has never been any correspondence from the Applicant to doubt the contents of the said reports. He recalled the testimony of **DW1** Sweetbert Mapolu who admitted that there was no report to qualify the three reports hence the allegation of negligence is unfounded.

It is the submission of Mr. Mayenga that elements of negligence were not met because the applicant did not prove that he suffered any damages resulting from the outcome of the investigation. He referred to pages 29 to 33 of the award where the arbitrator found none of

the reports has been conducted without the Applicant's instruction and that each report was based on its own scope.

After considering the submissions of the parties, now follows the analysis of issues. In addressing the framed question as to whether there are sufficient grounds to interfere with the CMA award, I will focus on the fairness of the reasons for termination and on the remedies.

Starting with the fairness of the reasons, the arbitrator found that there was no valid and fair reason in terminating the Respondent's employment. The arbitrator's reasoning was that the Respondent worked under instructions of the applicant in conducting all the investigations and that each investigation had a different scope. The Applicant is still insisting on negligence on the part of the Respondent.

As to whether there was negligence it is pertinent to ascertain what amounts to negligence. I sought guidance from the case of **Twiga Bancorp (T) Ltd. versus David Kanyika,** Revision No.346 of 2013, High Court of Tanzania, Labour Division, at Dar es salaam (unreported) which described the test of negligence. In this case it was held; -

"...negligence need to be measured by existence of a duty of care that and if a person breached that duty as a result of which, the other person suffers loss or injury/damage, and a person acts negligently, when he fails to exercise that degree of care which a reasonable man/person of ordinary prudence, would exercise under the same circumstances."

It is not disputed that the Respondent had a duty of care in carrying out the forensic investigation relating to fraud. The question in dispute is whether the said duty of care was breached and that the results of such breach if any, occasioned loss to the employer. The act of having 3 forensic investigations with distinct outcomes was interpreted by the Applicant as a negligence on the part of the Respondent. The applicant protested existence of such negligence on the ground that he was not solely the one responsible with the conduct of the investigations since they did it as a team which was led by another person and that in all the 3 investigations, each had its own instruction, scope and time hence giving distinct outcome may be a normal expectation in the profession.

The arbitrator analyzed the trends under which the 3 investigations were conducted. For purposes of clarity, I feel appropriate to reproduce a part of the said analysis hereunder as quoted from pages 30 to 32 of the Award, thus:-

> ***"That according to exhibit D-10A, complainant and the forensic team received the order to conduct an investigation of the Peertech company on 29th May 2020 from the head of retail credit Mr. Edwin Urassa with the following instructions (scope);***
>
> ***a. To review the applicant's salaries as per perspective salary slips***
>
> ***b. To understand the company's internal policy on raised salaries that meet the loans tenors from 36 to 60 months***
>
> ***c. To know whether there was, promotions and or confirmation made to respective staff and to evidence any such supporting letter addressed to respective staff.***

d. Discusses other matters enhancing our mutual business between their company and the bank (NBC and possibly to win more business.

e. To listen and get some feedback for the services that we render to them.

After the investigation, they prepared a report on the given scope on 10th June, 2020 with the feedback that the pay slips attached on top up application forms are genuine, and the top up loan application forms had indeed approved by the head of Human resources reflecting the actual basic salaries.

That according to exhibit D-10B, the complainant herein received the new scope from the Managing Director, Mr. Theobald Sabi on 29th June 2020 instructing the forensic investigation to expand the investigation and look into how the company was on-board and advice on whether the "Know your customer" (KYC) requirements were followed during the process of on-boarding. That the following were the annotated scope which were extracted from the second report that the investigation had to focus on:

1. *To review Peertech company profile and all documents used to onboard Peertech Company against the NBC private scheme, loan application submission checklist.*
2. *Interview all the staff members who participated on the process of on-boarding Peertech scheme. These are Mongateko Makongoro- Head of Sales, Mosses Minja-Head of Commercial Banking, Elvis Ndunguru-Director Business Banking.*
3. *Convene a meeting with the top up officials of the company to establish the going concern of the company, and*
4. *Analysis of the payment documents (salary slips, pay roll, pay as you earn and the pension contribution fund payment returns). All the documents were obtained from the company.*

After the investigation the second report was prepared on the above given scopes on 8th July 2020 with the feedback that the going concern of the company was suspicious hence the corporate guarantee was also suspicious. In the circumstance, the risk associated with the possibility of borrowers to default servicing their loans was high while possibility of recovery was low.

Thereafter three months later, on 30th October 2020, the investigation team again received instructions from the Managing Director Mr. Theobald Sabi to re-investigate the company/loan and advise him on whether the non-servicing of the loan by borrowers was caused by fraud or by performance of the company and advise him on the measures to be taken. The scope of the third investigation report D-10C were:

(i) To establish whether it is fraud or operational issue

(ii) To establish whether there was control breakdown/Gaps

(iii) To establish whether there is staff involvement.

After the investigation, an investigation team prepared a third report responding to the findings from the given scopes on 27th November 2020 with the feedback that there were forgeries on the part of Peertech/Borrowers at the time of engagement. The forgery was alarming from the first time of its on boarding based on the recommendations of the call of report made by Amon Moharindo on 9th April, 2019. At the end, they

recommended to the management to consider whether any measure had to be taken against members of MC and recovery proceedings should continue as per procedures.

Based on the above evidence, I am convinced that the exhibits adduced by both, shows that the three reports, were prepared based on different scope of instructions and different time as mentioned."

Basing on the above analysis, the arbitrator then formed opinion that the Respondent who is the instant Applicant failed to justify how the Complainant (instant Respondent) contravened the duty bestowed to him, hence failed to prove the fairness of the reason.

To cement his views, the arbitrator referred to the cases of **Elia Kasalile and 20 Others v. The Institute of Social Work, Civil Appeal No. 145 of 2016 CAT (unreported) at page 29**, where it was held; -

> *"The failure of employer to prove that she had valid and fair reason for the appellants' termination vitiates the whole process of termination of employment".*

He further referred to the case of **National Microfinance Bank vs Victor Modest Banda, Civil Appeal No 29 of 2018, CAT (unreporte**d)

In my view, the arbitrator's decision is well reasoned. It is true that every report had its own scope and instructions as comprehended by the arbitrator. It is apparent that there were several reports. One of them is **Exhibit D-10A** which was done by the respondent without discovery of fraud. After further instruction with different scope, the same investigator expanded the investigation and discovered fraud in the second report. The Applicant needed to provide sufficient evidence in the CMA to state how could the fraud be discovered with the first set of instructions given to the investigators. It is not explained in the CMA what were the applicant ought to have done to discover the fraud without the second set of instructions from the management. In the rejoinder, the Applicant contended that the Respondent was a well trained and experienced investigator who should have discovered the fraud. In my view, this does not counter the fact that there was never in existence a report from a more skilled investigator who faulted the Respondent's first report. The investigation turned into a different finding after additional ingredients due to the new set of instructions from the management.

As rightly opined by the arbitrator, the employer was required to prove how the Respondent contravened a rule of standard regulating the conduct relating to employment in accordance with **Rule 12 (1) and (3) of G.N. 42 of 2007.**

I do not agree with the Applicant that the disciplinary offence faced the Respondent did not require investigation prior to holding of the disciplinary hearing. In my view, it was an investigation report which should have given an expert opinion to fault the first investigation report by seeing whether there was negligence or not.

All the above said convince me to subscribe to the position of the arbitrator in finding that there was no fair reason proved for the termination of the Respondent's employment.

As earlier said, parties are bound by their own pleadings. In the pleadings, that is the chamber summons and affidavit, the Applicant did not indicate any intention to challenge the fairness of procedure. However, in the submissions, I found some paragraphs trying to explain that the procedure was duly followed. As said earlier in this judgment, I see it as something arising outside of what is pleaded. Nevertheless, I would point out that it is not disputed that the investigation was not conducted. Carrying out an investigation is a mandatory requirement under **Rule 13 of G.N 42 of 2007**. This

Rule makes investigation a mandatory exercise without an exception. I do not agree with the Applicant's assertion that the nature of the offence did not require investigation. In my view, investigation before holding disciplinary hearing ought to be the first undertaking the employer should have embarked into before going into the details of the disciplinary hearing. From my interpretation of **Rule 13**, it is the investigation report which leads the employer to ascertain the need of proceeding with disciplinary process and therefore its importance should not be underestimated. In my view, failure to conduct investigation in this case renders the procedure to be unfair.

From the foregoing, the issue as to whether the Applicant was fairly terminated from the employment is answered negatively. It is my finding that the termination was unfair in both reasons and procedure.

Regarding relief, Advocate Wivina challenged both the number of months remunerations awarded as compensation and the general damages. According to her, awarding **24 months** was not judiciously and that there was no evidence to prove sufferance to warrant damages of **TZS 100,000,000.00**.

I will start with the award of 24 months. The arbitrator was guided by the case of **Tanzania Local Government Worker's Union**

(TALGWU) versus Sospeter Gallus Omollo, Revision No. 265 of 2020 (Unreported). Since the discretion of the arbitrator was backed by the cited case law, I do not agree with Advocate Wivina that the award of **24 months** was issued not judiciously. I see no reason to differ with the arbitrator on this aspect.

Regarding general damages, the Applicant testified to have been affected in various social and economic aspects. He mentioned things such as lack of means to sustain his children's studies, and lack of housing as he used to stay in a house given to him by the Bank. That he could not enjoy a respective retirement that he expected. In my view, this was a prove of sufferance on the part of the Applicant which ought to be redressed. The arbitrator awarded **TZS 100,000,000.00 as redress**. In my view, this amount may be on higher side since the Respondent left only one year to retire. I will vary the general damages to the tune of **TZS 50,000,000.00**.

The above said, I conclude that the issue as to whether the Applicant has adduced sufficient grounds to warrant the revision of the CMA is answered negatively except for the quantum of reliefs on general damages which is varied to **TZS 50,000,000** instead of TZS **100,000,000.**

As to the relief of the parties in this Application, having found there to have a need to vary the quantum of damages, I hereby revise the CMA award and vary the amount concerning general damages by reducing the amount from **TZS 100,000,000.00** to **TZS 50,000,000.00**. All other findings and awarded entitlements in the CMA are not disturbed. I give no order as to cost. It is so ordered.

Dated at Dar es Salaam this 29th Day of March 2023.

KATARINA REVOCATI MTEULE

JUDGE

29/03/2023