IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA

LABOUR REVISION NO. 29 OF 2023

(Arising from Labour Dispute CMA/GTA/109/2021)

NMB BANK PLC.....APPLICANT

VERSUS

LESLIE PIUS NYAMKO .....RESPONDENT

JUDGMENT

31st May & 14th June 2024

ITEMBA, J.

This court has been moved to call for records, revise and set aside the award issued by the Commission for Mediation and Arbitration (the CMA). It was alleged that the respondent hereinabove, **Leslie Pius Nyamko,** was employed by the applicant, **NMB Bank PLC** herein the bank, as the 'relationship officer' from April 2008 up to November 2021 when her employment was terminated. At the time of termination, she was working at Geita branch. The grounds for termination were gross misconduct, gross negligence and gross dishonest. That, she processed loans to contrary to the bank procedures with intent to defraud the bank. Upon termination, the respondent lodged her dispute against the applicant, alleging unfair termination.

After the full hearing, the CMA issued a decision to the effect that there were valid grounds for termination but the termination procedures were not adhered to. The applicant was ordered to pay the respondent an amount of 15 months salary as a compensation for unfair termination. The decision aggrieved the applicant, determined to pursue her rights, she filed the present application.

According to the applicant's affidavit, the grounds of application are:

i. *Whether the arbitrator was right in finding that termination of the respondent was procedurally unfair.*

ii. *Whether the arbitrator was right to fault the termination on procedural unfairness after holding that the respondent admitted to have committed the misconduct.*

iii. *Whether the arbitrator was right to order payment of 15 months salary to the respondent based only on procedural unfairness of termination.*

When the application was called for hearing, the applicant was represented by Dr. George Mwaisondola while the respondent had the services of Mr. Yuda Kavugushi both learned counsels. The parties successfully moved the court for the submissions to be made through writing.

Arguing in support of the application, it was submitted that, the only reasons which the CMA relied in concluding that there were unfair procedures were absence of proof of composition of the Appeal Committee, lack of minutes of the Appeal committee and delaying on delivery of the Appeal Committee's decision beyond 30 days without assigning any reasons thereof. That, proceedings of the CMA hearing show that the respondent admitted to have been negligent and dishonest. That, in the High Court case of **Nickson Alex v Plan International**, Revision Application no. 22/2024, it was observed that, if the employee admits to have committed the offence, non-compliance of procedures becomes irrelevant. That, the same principle was reinstated in **Patricia Minja v Bank of Africa (T) Ltd**. Revision Application no. 316/2021. That, following the respondent's admission procedural issues should not have been entertained especially that there was no dispute that the Appeal committee sat to review the conduct and decision of the disciplinary committee. Citing the case of **Geita gold Mining Ltd v Tenga B. Tenga** Labour Revision no. 14 of 2021 the learned counsel insisted that, not all procedural irregularities are material and prejudice the respondent. That, the arbitrator should have stated how the respondent was prejudiced by

lack of those minutes of appeal committee and late delivery of the decision by the appeal.

He finalised by contesting the order of compensation of 15 months' salary and refereeing to the case of **Felician Rutwaza v World vision Tanzania** civil Appeal no. 213/2019 where the Court found that the termination procedures were unfair and reduced a compensation order of 12 months to only 3 months.

On his part, the respondent's counsel strongly opposed the application. He submitted that, for termination of an employment to be proper there must be valid reasons, fair reasons and fair procedure as stipulated under section 37(2) of the Employment and Labour Relations Act and Rule 8 of the Code of Good Practice GN 42/2007. That, the conditions must be complied with as emphasised in **Joseph Fissoo and 58 others v Ithna Asheri Charitable Hospital**, Civil Appeal 514/2020 CAT, Arusha where the CMA founds that there were valid and fair reasons for termination but the termination procedures were unfair. That in **Joseph Fissoo (supra)** it was held inter alia that, there is no middle ground when it comes to compliance with the termination procedures and the spirit of the law in as far as fair termination of fair contract is concerned. The

learned counsel did not dispute on the valid reason for termination. However, he stressed that, unfair procedures prejudiced the respondent rights and interests. He challenged the cited cases of **Nickson Alex** (supra) and **Geita Gold Mine Ltd**. (supra) in that they are no more good law following the decisions which he cited. He insisted that, the applicant failed to submit the proceedings of appeal and she could not prove that the respondent was given her right to be heard. That, the unfair treatment vitiates the whole proceedings as it was held in **FM Foundations Pre-Primary school v Goodness Tumaini Kitaa and another,** Labour Revision no. 31/2021, High Court Moshi (unreported).

In the last ground, the learned counsel submitted that the compensation of 15 months was justifiable considering the situation and hardship which the employee is likely to suffer. That, section 40 of the ELRA provides for a minimum of 12 months therefore, if the court finds 15 months unjustifiable, it can only reduce it to 12.

Having considered the rivalry submissions between the parties, and after going through the claims in the CMA form no. 1 proceedings, the issues to be resolved are:

i. *Whether there was valid reason for terminating the applicant's employment.*
ii. *Whether the procedures for termination were adhered to.*
iii. *What are the reliefs to parties?*

The Employment and Labour Relations Act, No. 6 of 2004 herein the ELRA, defines unfair termination under Section 37(2) as follows:

> *'(1) It shall be unlawful for an employer to terminate the employment of the employee unfairly*
> *(2) A termination of employment by an employer is unfair* ***if the employer fails to prove-***
> *(a) That the* ***reasons for termination is valid;***
> *(b) That the reason is a fair reason-*
> *(i) Related to the employee's* ***conduct****,* ***capacity*** *or* ***compatibility****; or*
> *(ii) N/A*
> *(c) That the employer was terminated according to* ***a fair procedure****.'* Emphasis supplied.
>
> *(3) N/A*
>
> *(4) In deciding whether a termination by an employer is fair, an employer, arbitrator or Labour Court shall take into account any Code of Good Practice published under section 99.*

Interpreting from these provisions, two issues are clear; first, termination of employment should be lawful in that, there should be valid reasons and fair procedures. Second, it is the duty of the employer to prove that termination was lawful.

The first issue will not detain me because as mentioned hereinabove, the respondent submissions, they do not challenge the reasons for termination but only the procedure thereof.

Similarly, without repetition, I have noted ample evidence from the records, to support that the respondent committed gross misconduct, gross negligence and gross dishonest. It is from the evidence of Lwitiko Jackson (DW1), a forensic officer and Katengesya Edward John (DW2), HR business partner. There are also detailed supporting documents such as the Investigation report (D1), Loan documents for Baraka (D2), MSE Product manual (D3), Loan Documents for Issa Saanane (D4). Loan application form and business license (D5) and Loan documents of Simon Mabuga (D6). Therefore, the reasons for termination were quite valid.

Moving to the 2nd ground, as stated, section 37(2) of the ELRA requires the procedure to be fair. But, the specifics of fairness of the

procedure where there are allegations of misconduct are found under **Rule 13 of the Employment and Labour Relations Code of Good Practice.** I find it significant to reproduce the said section as follows:

> *13-(1). The employer **shall conduct an investigation** to ascertain whether there are grounds for a hearing to be held.*
>
> *(2) Where a hearing is to be held the employer **shall notify the employee of the allegations using a form and language that the employee can reasonably understand.***
>
> *(3) The employee shall be entitled to a **reasonable time to prepare for the hearing** and **to be assisted in the hearing by a trade union representative or fellow employee**. What constitutes a reasonable time shall depend on the circumstances and the complexity of the case, but it shall not normally be less than 48 hours.*
>
> *(4) The hearing shall be held and **finalized within a reasonable time**, and **chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.***
>
> *(5) Evidence in support of the **allegations against the employee shall be presented at the hearing. The employee shall be given a proper opportunity at the hearing to respond** to the allegations, question any witness called by the employer and to call witnesses if necessary.*

(6) Where an employee unreasonably refuses to attend the hearing the employer may proceed with the hearing in the absence of the employee.

(7) Where the hearing results in the employee being found guilty of the allegations under consideration, the employee shall be given the ***opportunity to put forward any mitigating factors*** *before a decision is made on the sanction to be imposed.*

(8) After the hearing, ***the employer shall communicate the decision taken, and preferably furnish the employee with written notification of the decision,*** *together with brief reasons.*

(9) ***A trade union official shall be entitled to represent*** *a trade union representative or an employee who is an office-bearer or official of a registered trade union, at a hearing.*

(10) ***Where employment is terminated, the employee shall be given the reason for termination*** *and reminded of any rights to refer a dispute concerning the fairness of the termination under a collective agreement or to the Commission for Medication and Arbitration under the Act.*

(11) In exceptional circumstances, ***if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with them****. An employer would not have to convene a hearing if action is taken with the consent of the employee concerned.*

*(12) Employers **shall keep records for each employee** specifying the nature of any disciplinary transgressions, the action taken by the employer and the reasons for the actions*.

Therefore, the key issues to be considered and complied with during termination are as mentioned and highlighted above. The CMA decision was that there was no fair procedure due to lack of Disciplinary Hearing and appeal hearing minutes. The respondent's submission was that there was no minutes of the Disciplinary hearing and Appeal which translates that the respondent was not given her right to be heard.

As per the records, DW1 and DW2 testified that Disciplinary Hearing was conducted. Further, according to the respondent's testimony at the CMA noted that she testified and stated that the Disciplinary hearing was done on 26/8/2021 in Mwanza, the chair was zonal manager but he disqualified himself because he had interest and Sospeter Masesa took over. That, the outcomes were given on 4/9/2021. And, the outcomes of appeal came after 30 days. therefore, basically before the CMA the respondent's complain was on the grounds for termination.

The respondent did not complain that there was no disciplinary hearing. Bringing those claims at this stage is an afterthought and it cannot

be entertained. It is a settled legal principle that an appellate court, cannot allow parties to raise matters that were neither raised nor pleaded in the lower courts as it was held in the case of **Hotel Travertine Limited & Others vs National Bank of Commerce Limited** (Civil Appeal 82 of 2002) [2006] TZCA 16.

I take note of the cited decision of **Joseph Fissoo (supra)** but I firmly believe that the circumstances are different in the present case, and each case it usually decided based on its merits. It is my findings that these minutes are important to reflect what transpired at the hearing but it cannot be said that its absence cannot be translated as unfair procedure. Absence of minutes does not suggest that the meeting was not done or it was done unprocedural. I say this because in this case there are other supporting documents which were undisputedly produced at the CMA by the respondent which shows that there was a disciplinary hearing. There was the chargesheet (D8), notice to attend the disciplinary hearing (D10) and outcome of disciplinary hearing D11

Unless the CMA or the respondent had pointed out a specific violation made during the disciplinary hearing, say the respondent was not given a right to be heard, the composition of the committee was biased and the

like, one cannot assume that there was unfair treatment to the respondent because there was no copy of minutes produced.

Nevertheless, I have noted that, during re examination the respondent for the 1st time raised the issue that one 'Baraka' had interest that is why he disqualified himself as the chair of the disciplinary hearing, she complains that, yet, the said Baraka is the one who coordinated the hearing and signed the termination letter.

This issue should not hold me because, first it was raised in the re examination therefore the applicant could not have cross examined on it, secondly even the CMA did not venture on it thus it cannot be dealt with at appeal stage.

Moreover, I have considered this matter and find that so long as it is undisputed that, the said Baraka disqualified himself form chairing the Disciplinary Hearing, he did not have influence in the said meeting and on the decision reached, therefore, only signing the letter does not prejudice the respondent in any way.

I have gone through the rest of available exhibits D8 to D19 which are as follows: Charge Sheet (D8), Statement of Leslie Nyamko (D9),

Notification to attend disciplinary Hearing (D10), Outcome of disciplinary hearing (D11), Termination letter (D12), Management letter (D13), Appeal by Leslie (D14) and Reply of the Appeal (D15), Leslie's Loan form (D16), Leslie's Bank statement D18 and Human resource policy (D19). Indeed, the minutes of the Disciplinary meeting and minutes of the Appeal committee were not produced at the CMA hearing. Yet, the requirements of fair procedure under Rule 13 are as stipulates hereinabove, the minutes of disciplinary meeting and Appeal are not part of them. I have considered that, investigation was conducted and the report was produced at the CMA, the charge sheet was clear to the respondent, the respondent was given time to prepare for hearing and right to be represented. She was given a chance to submit her mitigating factors and she was given her notice of termination with reasons thereof.

To conclude, it is right to state that, under the balance of probability, the termination of the respondent was fair in reason and in procedure.

Therefore, this application succeeds and it is hereby allowed. Consequently, the order for compensation of 15 months' salary to the respondent is hereby set aside.

I make no orders for costs, this being a labour dispute, let each party to bear its own cost.

It is so ordered.

DATED at **MWANZA** this 14th day of June, 2024.

L. J. ITEMBA
JUDGE

Judgment delivered in chamber, in the presence of Mr. Iche Mwakira, counsel for the applicant also holding brief for Mr. Yuda Kavugushi for the respondent and Ms. G. Mnjari, RMA.

L. J. ITEMBA
JUDGE