IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 509 OF 2019

BETWEEN

GEORGE T. PETER AND ANOTHER..... APPLICANTS

VERSUS

HIGHER EDUCATION STUDENTS

LOANS BOARD.....RESPONDENT

JUDGEMENT

Date of Last Order: 04/08/2020

Date of Judgement: 16/10/2020

Aboud, J.

The application is made under Sections 91 (1) (a), 91 (2) (c) and 94 (1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004 (here forth the Act), Rules 24 (1), 24 (2) (a) (b) (c) (d) (e) (f), 24 (3) (a) (b) (c) (d) and 28 (1) (c) (d) (e) of the Labour Court Rules, GN. No. 106 of 2007 (hereinafter the Labour Court Rules).

The applicants, George T. Peter, the first Applicant and Gerald Sawala, the second Applicant calls upon the Court to call for record, examine, revise the proceedings and set aside the award issued by the Hon. Fungo, E.J. Arbitrator of the Commission for Mediation

Arbitration (the CMA) in the Labour Dispute No. CMA/DSM/KIN/R. 95/1029 dated 10/04/2017.

The application was heard by way of written submission and Mr. Revocatus T. Mathew, Learned Counsel represented the Applicants while Ms. Lilian Machagge, Learned State Attorney was for the Respondent.

The background of this application is that on 01/04/2009 the first Applicant, Mr. George T. Peter was employed by the respondent and the second applicant, Mr. Gerald Sawala was employed on 01/07/2009. They both worked as Loans Officers Grade II and Senior Loans Officer respectively under the Loans Disbursement Department of the Respondent until 18/05/2012 when their employment contracts were terminated.

The reasons for the termination according to their termination letters dated 18/5/2012 which were tendered as exhibits was the applicants' gross misconduct, that they: -

1. Intentional and negligent preparation of loan disbursement schedules dated 29th March 2010 for TZS 33,830,000.00 for 58 first year students of Mkwawa University College of Education.

2. Intentional and negligent preparation of loan disbursement schedules dated 29th March 2010 for **TZS 15,512,000.00** for 164 continuing students of Mkwawa University College of Education.
3. Intentional and negligent processed disbursement amounting to **TZS 50,370,600/=** over and above the allocations that had been approved by the Loan Allocation and Repayment Committee (LARC) which gave room for another forgery amounting to **TZS 16,540,000.00**.

The applicants were aggrieved by the respondent's decision to terminate their employment contracts and they referred their claims for unfair termination at the CMA, where they sought for reinstatement; and all their entitlements award. After consideration of the agreed three issues as framed, that whether the termination of employment was procedurally fair, whether the respondent had valid reason for termination of employment and to what reliefs are parties entitled plus the evidence by the parties, the CMA awarded in favour of the respondent. In other words, the applicants' complaints were not successful at that stage.

Applicants being further dissatisfied with the CMA award they filed this application for revision.

The affidavit in support of the application under paragraphs 4.4, 4.5, 4.6, 4.7, 4.8 and 4.9 have grounds or legal issues for the determination of this Court. For easy of reference, they are as follows: -

(i) That, this Honourable Court may be pleased to call for, revise the proceedings and set aside the award made by the Commission for Mediation and Arbitration at Dar es Salaam in CMA/DSM/KIN/R. 791/13/921 (Hon. E.J. Fungo, Arbitrator) dated 27/11/2014 so as to satisfy itself as to the material irregularities on the Arbitrator's award and make appropriate orders.

(ii) Any other relief that this Court may deem fit and just to grant.

During hearing, Mr. Revocatus Mathew, Learned Counsel for the applicants submitted in all six ground or legal issues of this application which will be referred in this judgment as first to six grounds of revision.

Submitting on the first issue for revision, Mr. Revocatus Mathew, Learned Counsel submitted that the Arbitrator in his award without due regard to the testimony of the Applicants, erred in both law and facts to conclude that the Respondent had a valid reason to terminated employment contracts of the applicants. He further submitted that the respondent did not prove by evidence how the applicants committed the alleged of misconducts. Thus, the Arbitrator disregarded the fact that there was no valid reason (s) to terminate the applicants on the basis of the evidence available on record.

Mr. Revocatus Mathew further submitted that the Arbitrators award was wrongly based on the evidence that the applicants disbursed loans twice in single batch to one loan beneficiary of Mkwawa University, that is the serial no. 13 and 15 was one and same person which was contrary to the disbursement procedures. The Learned Counsel vehemently argued that such decision has no justification because there was no any letter from Mkwawa University requesting loans for various students. And the Arbitrator failed to appreciate the fact and evidence that the applicants were in loan disbursement department not in Loan Allocation Department or Loan Allocation where they allocated and approved the alleged loan to

students respectively. Thus, he said in the process if there was a mistake in disbursing the alleged loan that was a mistake made by a Loan Allocation Committee and not them.

Mr. Revocatus Mathew concluded in this issue by arguing that the loans were given to Mkwawa University Students after the Board verified the information and received audit reports to the effect.

Resisting to the first legal issue in this application, the Respondent's counsel strongly submitted that the testimony and documents tendered at the CMA had genuine reasons which satisfied and justified the Arbitrators decision that, there were valid reasons to terminate the applicants' employment contracts. Ms. Lilian Machagge argued that the Arbitrator found that the applicants committed gross negligence when they disbursed the loans in question, specifically on three aspects, that is: -

(a) Reoccurrence of the name of Haule Christopher Nicolous on two numbers (13 and 15) in the lists of students during the process of reimbursement of the stationaries expenses for first, second and third quarter of 2009/2010.

(b) There was no legal request from the students which authorized the applicants to issue the funds on the process of reimbursement to the said students.

(c) The implication of the said gross negligence led to the loss of Tshs. 42,151,300/= caused by the applicants.

Miss Lilian Machagge further submitted that; the applicants were found guilty as charged. The applicants were found guilty for forgeries committed during loans disbursements for 2009/2010 in this matter as they committed such intentionally and it was proved in the award of the Arbitrator that, they committed a gross negligence in the course of discharging their duties as loan officers of the respondent.

The respondent's counsel further submitted that; the applicants admitted to have committed the offence charged in their testimonies before the CMA as it is reflected in the Arbitral award as well as proceedings of the CMA.

I propose to pause here in order to first consider the submissions made by the learned counsels on the first issue of revision that; whether there was valid or substantive reason to terminate the applicants. In this issue I will not take much of my time

where the learned counsel for the respondent urged the Court to dismiss it because it was proved in the award that, the applicants committed a gross negligence in conducting their work as officials who were responsible for loans disbursement at the respondent's office.

There is no doubt in my mind that, the question before this Court is whether there is sufficient evidence which were considered by the arbitrator to prove that alleged gross negligence committed by the applicants.

The act of "Gross Negligence" has been defined by S.L. Salwan and U. Navang, in their Legal Dictionary, 25th Edition of 2015 to mean that: -

> *'The phrase gross negligence indicated a marked departure from the normal standard of conduct of a professional man as to infer a lack of that ordinary care which a man of ordinary skill would display'.*

It was also defined in the case of **Twiga Bancorp (T) Ltd. Vs. David Kanyika**, Lab. Rev. No. 346 of 2013, Dar es Salaam where

Hon. Rweyemamu, J. (Rtd) stated to mean:-

> *'a serious careless, a person is gross negligent if he falls far below the ordinary standard of care that one can expect. It differs from ordinary negligence in terms of degree'.*

Also, the case of **Donoghue vs. Stevenson** (1992) UHKL, 100 established three principles in a test for a tort of negligence as follows: -

> *'(i) That there was a duty of care.*
> *(ii) That there was a breach of that duty.*
> *(iii) That the breach of the duty cause losses'.*

The above elements were also elaborated in the case of **Tanzania Revenue Authority Vs. Thabit Milimo and Another**, Labour Division Dar es Salaam, Revision No. 246 of 2014 (2015) LCCD 1 (191), where the Court held that: -

> *'In the law of negligence liability arises where:-*
> *(i) There is a duty of care and a person breaches that duty as a result of which, the other person suffers loss or injury/damage.*

(ii) 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.

(iii) Negligence is the opposite of diligence or being careful'.

In applying the principle of gross negligence in this case, the Court considered that the applicants' contention that the arbitrator wrongly found the respondent had valid reason to terminate them because such decision was not supported by evidence. They further contended that it was wrong for the arbitrator to be satisfied that, applicants negligently disbursement loan to one student whose name appeared twice in No. 13 and 15 as a loan beneficiary. Applicants also argued that, such finding was not proper and it cannot justify the decision of the employer to terminate their contracts of employment. According to the applicants there was a request from Mkwawa University requesting loan for various students and they allocated such loan after Loan Allocation Department allocated to those students and was approved by the Loan Allocation Committee. So, the Arbitrator award was wrong to find that there was no letter requesting such disbursement of loan from Mkwawa University, and if

there was a mistake was not of the applicants but a Loan Allocation Committee.

It is on record that during arbitration hearing the applicant, Mr. Gerald Sawala in his statement which is reflected at page 19 in paragraph 2 of the award, he admitted that the name of one beneficiary of the student loan appeared more than once, where he stated, I quote: -

> *'Hata hivyo kuwa na jina kwa kujirudia si tatizo kwa kuwa index namba ni tofauti, hivyo ni kweli jina moja lilijirudia'.*

Also, the first applicant, Mr. George he admitted to have committed the offence when he testified that the student whose name appeared more than once in the list of beneficiaries of loans was from Mkwawa University and was approved by the TCU.

In his own statement as is indicated in page 29 of the award he said:-

> *'Kwa kuwa alikuwa mwanafuzni mmoja wa Mkwawa na alikuwa approved na TCU'.*

Applicants also admitted that they disbursed the alleged loan without a request letter from the responsible High Leaving Institution

as it is in the award at page 29, where the arbitrator referred what was testified by the 2nd applicant, he said, I quote: -

> *'Shahidi akijibu hoja hii alisema kuwa nilisema yalikuwepo au kutokuwepo sikumbuki bali ninachokifahamu maombi yasingepitishwa bila barua'.*

The record in Court further reveals that the applicants being loan disbursement officials of the respondent admitted to have committed the offence charged as they responded to the charges reflected in Exhibit AY2 of the CMA proceedings. Applicants admitted to have been aware of the procedures of disbursing loan at the respondents' office. They clearly stated that it was their duty before processing any disbursement of loan to ensure that loans for students were approved by the authority, that is the Loan Allocation Committee, all students who were to get loans were registered by the respective university and had submitted invoice for those student and, there is a request for the specific amount of money from that particular university and lastly there must be instructions from their supervisor that is the Assistant Director for Loans Disbursement instructing them to prepare such payments.

Further the record shows that, despite the applicants being aware of the procedures of loan disbursement they did not adhere to them, hence caused the loss to the respondent of Tshs. 33,830,000.00. The evidence at the CMA (Exh. AY2, testimony of DW2) vividly shows that the applicants had a duty to prepare payments list by comparing the names approved by the authority, the Loans Allocation and Repayment Committee and those appearing in the request from the respective university. And they had to make sure all the names in the disbursement schedule tallies with their approved amount by the Loan Allocation and Repayment Committee. Had it been that the loan disbursement was carefully done by the applicants as professionals of such activity of the respondent, the applicant would have not included the name of one student twice as it appeared in serial number 13 and 15 in the loan disbursement schedule. The name of such student, Haule Christopher was to appear only in serial number 13 as was approved by the Loan Allocation and Repayment Committee and not in serial 15 which was not approved by such authority.

From the above discussion it is crystal clear that the applicants acted negligently in disbursement of the loans as charged by the

respondent. Being loans disbursement officials, they had a duty of care to follow the procedures in doing so as they well testified to be knowledgeable of those clear procedures. But applicants breached their duty by negligently doing their schedules work which caused the loss to the respondent. They committed a misconduct of gross negligence in labour industry. The misconduct of gross negligence is clearly provided in our labour laws, specifically under Rule 12 (3) (d) of the Employment and Labour Relations (Code of Good Practice) Rule, GN. No. 42 OF 2007 (herein the Code) that: -

> *'12 (3) - the acts which may justify termination are: -*
>
> *(d) Gross negligence'.*

Thus, in my view I find no reason to fault the Arbitrator's award that the respondent had valid reason to terminate the applicants on misconduct of gross negligence, and that was substantively fair termination.

I move on to another issue contending that the procedures for termination of the applicants' employment contracts were not followed as provided in law and the arbitrator wrongly found the termination in issue was procedurally fair. I have also perused

authorities which the learned counsels cited to the Court in the course of their respective submission.

In its written submission, the learned counsel for the applicant submitted that, the Arbitrator failed to consider that the respondent did not comply with the mandatory prescribed procedures provided for in its Staff Service Manual of 2007.

In this issue, it was further submitted that investigation was not conducted to ascertain whether there were grounds of hearing to be held at the employer's level as provided by Rule 13 (1) of the Act as well as paragraph 9:33 (vii) of the Staff Service Manual of the respondent. The learned counsel argued that the applicants were made to appear before the probe committee which it had liberty to call and questioned the applicant, and finally submitted its report to the Appointment and Discipline Committee. Thus, he submits that it was wrong for the applicants to appear before the probe committee which had no legal powers of the Disciplinary Authority. He contended that the respondent violated the provisions of paragraph 9.3.3. (xiv) of the staff service manual which requires the charged employee to appear before the disciplinary authority to defend themselves, the opportunity which the applicants were denied as they

testified during arbitration hearing. Therefore, applicants were denied their right to be heard as is provided under Rule 13 (5) of the Code.

The applicants counsel further submitted that applicants were not availed the appointment and disciplinary committee report which were entitled to have it as a matter of right. So, applicants were denied such right which was against principles of natural justice. Therefore, the learned counsel concluded that, Arbitrator failed to consider the evidence that these procedures were not followed and it was proved the disciplinary hearing was conducted with bias because the disciplinary authority was a person who had interest in the matter, which is against the rule of natural justice. It is the submission of the applicants' counsel that the Executive Director who charged them was the same person who sat as the chairperson of the Disciplinary and Appointment Committee on 18/05/2012. He argued that such action of the Executive Director was contrary to the rule against bias and the principle of venue judex in cause suo which bars a person from acting as a judge in his own case.

The applicants in their written submission also faults the Arbitrator for failing to appreciate the fact and evidence related to improper procedure which was followed by the respondent during the

appeal stage of this matter because applicants were not notified on the date which the appeal shall be determined as is required in paragraph 9.4 (iv) of the staff service manual 2007. Also, the Executive Director whose decision to terminate the applicants was the Secretary of the Appellate Body and, was given a chance to respondent on grounds of appeal.

Thus, in conclusion the applicants counsel submitted that Arbitrator failed to appreciate the laws governing procedures for the applicants' employment termination.

The respondent's learned counsel prefaced her reply submission by urging the Court to dismissed the second ground/issue of this revision because has no merit.

The main thrust of the respondent's counsel submission was to demonstrate the extent the respondent complied or adhered to the fair termination procedures as they in the Staff Service Manual and the Employment and Labour Relations Laws of the Land. It was submitted that, the procedures for fair termination were duly and legally adhered to by the respondent before, during and after termination of the applicants. The respondent's counsel further submitted that, there is proof showing that the applicants were

interdicted for the purposes of letting the respondent to investigate about the alleged offences committed by them.

The respondent also argued that the Disciplinary Hearing Committee conducted the hearing as it is provided under the Staff Service Manual. It was further submitted that as long as at the disciplinary committee applicants were found guilty, the disciplinary hearing committee submitted its report to the appointments and disciplinary authority. The respondent's counsel argued that the applicants were not denied their case as they alleged because they were given ample time to argue their case and, it is in records that they did so in writing and verbally. It is also submitted the applicants were not denied access to defend their case at the Appointments and Disciplinary Committee (ADCM) which received the disciplinary hearing report and accordingly advised the Executive Director bases on the report from the inquiry committee. Thus, it was argued further that the applicants had opportunity to argue and defend properly their case before the disciplinary authority decided their fate and it was not necessary for them to appear and defend their case before the ADCM.

On the issue that applicants were not notified to appear before the appellate body of the Board of Director as required in law, the respondent counsel submitted that it was not a legal requirement that applicants were to appear before such appellate body. It was argued that the appeal was conducted by written submission, where the applicants first filed their appeal and followed by their written submission and in reply the respondent responded by filing submission to defend its decision against the applicants.

It was also submitted by the respondent's counsel that at the appellate stage it was not a mandatory requirement that the appellants were to be called to appear. That the Board of Directors had discretion to call them if it was necessary to do so.

In its written submission the learned counsel for the respondent submitted further that, the contention by the applicants that their right to be heard were violated has no any basis. She argued that, the applicants themselves testified before the Arbitrator that were availed the right to be heard by the respondent during the termination procedures, specifically when they appeared before the committee which inquired their case as is reflected in page 21 at paragraph 2 and page 32 at paragraph 2 of the impugned award.

Thus, the learned counsel submitted that the court should not entertain the applicants' mere assertion based on allegation and speculation. It was further submitted that the Court should not consider the applicants ground of revision that arbitrator did not analyses their facts, evidence, closing submission and the applicable law which led him to a wrong conclusion and finally improper award.

Finally, the respondent counsel submitted in response to the ground that arbitrator erred in both law and fact in finding that applicants are not entitled to the remedies available when there is unfair termination. It was submitted that since the offences charged against the applicants were proved as is indicated in pages 19, 25 and 29 of the award then the arbitrator's award was correctly made. It was further argued that there was valid reason and fair procedures in terminating the applicant, so no remedy was available for them. Hence the application should be dismissed.

On the issue of procedural fairness in terminating the applicant, it is on record that Arbitrator considered the evidence of DW1 in this aspect. DW1 testified that the respondent before charging the applicants made its investigation and was satisfied that some charges were to be prepared against them. In his testimony DWI also

tendered various exhibits including charges against the applicants and as per the applicants' letters to show cause which was admitted as exhibit AY1 collectively. The fact that the charges against the applicants fell under the offences involving interdiction as per the Staff Service Manual, and the Code, the respondent properly interdicted them as per paragraph 9.12 of the relevant Staff Service Manual and, for easy of reference led me accordingly reproduce them as follows: -

(a) Where the Executive Director considers that it is in the interest of the Board that an employee should cease to perform the duties of the post while a breach of discipline on the part of the employee is being investigated, the Executive Director shall interdict the employee and shall inform the employee of the reasons.

(b) Interdiction should immediately, or in any case within thirty (30) days, be followed by the institution of a charge against the employee.

(c) If a charge cannot be instituted within thirty (30) days of interdiction, the Disciplinary Authority may grant an extension and state the period within which charges may be preferred against the employee.

(i) An employee of the Board who is interdicted shall receive fully salary as per Employment and Labour Relations (Code of Good Practice) Rules, 2007 Section 27 (i);

(ii) An employee who is interdicted shall not leave the working station without prior written permission of the Executive Director;

(iii) Interdiction shall not exceed four (4) months, except in cases, which involve police investigation;

(iv) Except where any other law, such as the Employment and Labour Relation Act, 2004, provides for disciplinary procedures against and employee the provisions of this manual shall apply;

(v) Formal disciplinary proceedings shall be instituted by the Disciplinary Authority by preferring a written charge against the employee concerned which shall clearly set out the allegations against the employee;

(vi) Any charges against any of the employees of the Board other than the Assistant Director and above shall be signed and issued by the Executive Director;

(vii) The Board or the Executive Director, as the case may be, shall appoint Disciplinary Hearing Committee comprising of not more than five members to hold a hearing into the charge/charges.

It was evidenced further that, applicants had opportunity to respond to the charges as per the exhibit AY2. Following their response, they were summoned to appear before the disciplinary hearing on 01/05/2012 as per AY3 and was chaired by DW3, the Assistant Director (Mkurugenzi Msaidizi Utoaji wa Mikopo) Mr. John Elias. The relevant committee had the opportunity to hear the defence of the applicants and finally gave its report as per exhibit AY4 on record. According to the record the relevant report was tabled to the ADCM which is composed together with the Disciplinary Authority, the Executive Director as per paragraph 9.9 (ii) of the HESL which states that: -

'There shall be two disciplinary authority at the board these are: -

(i) The Board of Directors for the Executive Director, Internal Directors and Assistant Director,

(ii) The Executive Director for all Other Staff'.

Thus, the ADCM on the basis of the report terminated the applicants as per the minutes which was tendered at the CMA as exhibit AY6.

On the allegation that the applicants were not given opportunity to be heard, the Court found this has no basis. It is on record and as well submitted by the respondent's counsel that, they had such opportunity during the disciplinary hearing where the inquiry was conducted by receiving the evidence of both parties. Applicants were accorded adequate right to be heard. Applicants contended that their right to be heard was denied during the appeal stage. It is my considered view and I fully agree with the respondent's counsel that the law, that paragraph 13 of the Guideline for Disciplinary Incapacity and Incompatibility Policy and Procedure of the Code read together with paragraph 9:14 of the HESL does not obliged the Appellate Body to call the appearance of the appellants are hear their oral submission on their appeal. In fact, what is required is an appeal to the Board of Directors in writing with a copy to the Executive Director who is responsible to write submission in defense regarding the appeal with a copy to the appellants as per paragraph 9.14 (i) (ii) of the HESL.

It is also provided under paragraph 9.14 (v) (vi) of the HESL, that: -

> *'9.4 (v) - In determining the appeal, the Board may summons the appellate and/or any other person to give evidence,*
> *9.4 (vi) - The Board may further require the appellant to produce further explanations in support of the appeal in writing or orally'.*

On the basis of the above and in consideration of paragraph 13 of the Code, I am convinced that the appellate body in this matter was right not to constitute a re-hearing of the entire case involving the applicants as they would wish it to be done during their appeal consideration.

Thus, in my perusal of the arbitrator's award I found he considered the evidence by both parties being it witnesses testimonies and exhibits and correctly reached a decision in the award that, the termination of the applicants was based on fair procedures. It is crystal clear that the respondent's allegation against the applicants were supported by evidence at the hearing as is provided under Rule 13 (5) of the Code which provide as follows: -

> *'Evidence in support of the allegation against the employee shall be presented at the*

hearing. The employee shall be given a proper opportunity at the hearing to respond to the allegation, question and witness called by the employer and to call witnesses if necessary'

Therefore, on the basis of the above discussion it is transparent and very clear that the arbitrator correctly found the applicants were given the right to be heard and termination procedures were adhered to by the respondent.

On the issue of reliefs that the arbitrator wrongly decided the applicants were not entitled to reliefs under section 40 of the Act. Section 40 (1) of the Act provide that: -

'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.'

On the basis of the above position, it is my view that having found the applicants' termination was both substantively and procedurally fairly, they are therefore not legally entitled to the remedies provided under section 40 of the Act as they claimed.

In the result, I find that the application has no merit because the applicants' termination was fair in all aspects that is both substantively and procedurally. The Arbitrator's award is accordingly upheld and the application is dismissed.

It is so ordered.

I.D. Aboud

JUDGE

16/10/2020