IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 348 OF 2020

TANZANIA INVESTMENT BANK.....APPLICANT

VERSUS
BENJAMIN MAZIGO & ANOTHER ..... RESPONDENT

JUDGMENT

Date of last Order: 29/07/2021
Date of Ruling: 27/08/2021
Z.G.Muruke, J.

Aggrieved by the award of the Commission of Mediation and Arbitration [herein to be referred as CMA] the applicant herein, has filed this application which is supported by the affidavit of Menson Ngahatilwa, their Principal Officer seeking to revise the award on the grounds stated at paragraph 5(1) to 5(11) of the affidavit. The application was challenged by the counter affidavit sworn by Yuda Thade the Respondent's Advocate.

It is on record that, the respondents were employed by the applicant on diverse dates. They worked with the applicant until 12nd August, 2016 when they were terminated on ground of gross misconduct. The respondents were dissatisfied with the termination. They referred the matter to the CMA where decision was on their favour. The applicant felt resentful with the decision hence the present judgement.

The matter was disposed by way of written submission. The applicant was served by Advocate Raphael Rwezaula whereas the respondents were served by Advocate Evance R.Nzowa.

In support of the application, the applicant's counsel on the 1st and 2nd ground it was jointly submitted that, the policy requires discounting such type of security by 30%, but the respondents opted to discount it by 20% contrary to the policy. There conducts amounted to gross negligence and the same justifies termination as per Rule 12 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. 42/2007, He referred the case of **World Vision Tanzania v. Charles Masunga Maziku, Rev.No.7/2014** when citing the case of **Scientific and Industrial Research v. Fier (1996) 17 ILJ 18 (A) at 26 D-E,** South African Court of Appeal, where it was held that the rule of standard regulating conduct in relating to employment requires the employee to act in good faith when performing his duties. To that juncture, if an employee acts to the contrary the consequence will affect employment relationship between the employer and employee. Therefore, the respondents were terminated on valid and fair reason.

On the 3rd and 4th grounds it was submitted that from exhibit D5 the 1st respondent admitted that, the discounting rate was supposed to be 30% as per the Credit Policy of 2011, and that being reviewer and Manager failed to disclose policy exception to the Board. The 2nd Respondent being in the appraising team, prepared the financials, provided the cash flows, reviewed the application and signed it, despite of the discrepancies. Therefore, it was wrong for the arbitrator to exonerate 3the respondents from the responsibility for the misconducts

despite the fact that, they had admitted being involved on the reason that there were other employees involved in the transaction .

As regard to the 5th ground, it was submitted that, the arbitrator improperly raised the issue of using Investment Policy of 2014 instead of Credit Policy of 2011 to terminate the respondents, referring the case of **Alaf Limited v. Asulwisye Mwalupani**, Rev.282/2014.

On the 6th and 7th ground it was contended that, the rule of natural justice states that no man should be condemned unheard and indeed both sides should be heard unless one side chooses not to, referring the case of **Kastan Mining v. Devota Salum,** Misc. Application No. 342/2019 where it was held that;

> *'... it is a basic law that no one should be condemned to a judgment passed against him without being afforded a chance of being heard. The right to be heard is a valued right and it would offend all notions of justice of the rights if the rights of a part were to be prejudiced or affected without the party being afforded an opportunity to be heard...'.*

In assessing compliance with GN.42/2007, arbitrators should not be tied by a check list approach, citing the case of **Alaf Limited v. Asulwisye Mwalupani** (supra), the respondents were afforded with a right to be heard as exhibit through exhibits TIB-1, TIB-2, TIB-3, TIB-4 and TIB-5. The law does not put it mandatory for an appeal against termination to be only within the employer's forum, citing Rule 13(10) of GN/42/2007. The arbitrator wrongly held that there was denial of a right to appeal.

On the remaining four grounds, it was jointly submitted that, the arbitrator wrongly awarded the respondent compensation of twenty-four (24) months contrary to Section 40(1) (c) of the Employment and Labour Relations Act, CAP 366 RE 2019. The arbitrator relied on the unverified notification that, the second respondent was dead, that is not among the factors to be considered in awarding compensation in the meaning of Rule 32(5) of the Labour Institution (Mediation and Arbitration Guidelines) Rules, GN.67/2007. He thus prayed for the application be granted. He insisted on the prayers in submission in chief.

In refutation, the respondent's counsel on the 1st ground contended that, the arbitrator's decision was based on the evidence adduced by the parties before CMA, hence he was right to decided that the applicant had no valid reason of terminating the respondent, referring. The fact that the loan was approved by the board, it is an indication that they were satisfied by the correctness of the same, taking into consideration that, the proposal passed through other departments such as risk management and credit committee which is chaired by the Managing Director, citing the case of **Mussa Andrea Mfunga v. Tanzania Electric Supply Co. Ltd** (2015) part 1 LCCD.

It was further submitted that, the applicant failed to tender the said TIB Code of Conduct to prove the rule contravened by the a[applicants. He cited the case of James **Leonidas Ngonge v. DAWASCO** (2014) Part 1 LCCD.40. The records show that the recommendations were done by the respondents in 3-4 years back. The respondents were just recommending manager and not final person to approve the loan, hence, it was unfair to terminate them for gross

negligence contributed by their superiors, referring the case of **Twiga Bancorp Ltd v. Zuhura Zidatu and Mwajuma Ally**, (2015) Part 1 LCCD 18.

On the 2nd and 4th grounds Mr. Nzowa submitted that, the arbitrator was right to exonerate the respondents from liability, as the responsible person were those who approved the loan and not who made recommendations. The loan process includes Risk Management Unit, Credit Committee chaired by Managing Director and finaly the Board. It was the arbitrator's finding that if there was a misconduct, then all who were involved in the chain of issuance of the loan were supposed to be disciplined, as per Rule 12 (5) of GN.42/2007.

As regard to the 3rd ground it was argued that, the respondents have never admitted to have committed the said misconduct or having understood the charge because they were not formally charged apart from being served with notice to show cause. He added that, the issue of investment policy of 2014 was raised by DW2 and not the arbitrator.

Concerning the 5th ground, it was submitted that, internal appeal process is part and parcel of disciplinary hearing, thus as found by the arbitrator its denial amounts to denial of a right to be heard. If the respondents were afforded with the right to appeal, the higher authority might have come with a different decision.

On the remaining grounds it was submitted that the respondents prayed for reinstatement. The arbitrator after finding that termination was both substantively and procedurally fair ought to have ordered reinstatement, citing the case of **National Bank of Commerce v.**

Eliamin Mbeo (2014) LCCD Part II,116. He thus prayed for this court to order reinstatement.

In rejoinder the applicant's counsel reiterated their submission in chief. In addition, he stated that all the cases cited by the respondent are distinguished in the circumstances of the matter at hand.

Having gone through the contesting submissions, affidavit and counter affidavit and CMA's record, I believe that this Court is called upon to determine the following issues:

1. Whether or not the applicant had a valid reason for terminating the respondent.
2. Whether or not the procedures for terminating the applicant were adhered to.
3. The reliefs entitled to the parties.

Staring with the first issue, it is a principle of law that, termination of employment must be on valid and fair reasons and procedure. For termination to be considered fair, it should be based on valid reasons and fair procedures. There must be substantive and procedural fairness of termination of employment as provided for in **Section 37(2) of the Employment and Labour Relations Act, CAP 366 RE 2019,**which states that:-

'Section 37 (2) A termination of employment by an employer is unfair if the employer fails to prove-

*(a) that the **reason for the termination is valid;***

*(b) that the **reason is a fair** reason-*

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer, and

(c) that the employment was ***terminated in accordance with a fair procedure."***

[Emphasis is mine].

In the matter at hand, the respondents were terminated on ground of gross negligence. It was the CMA's finding that the applicant had no valid reason of termination since, the respondent's recommendation was not final as loan processing involves different department from proposal to the approving department.

I have thoroughly gone through records and found that, it is undisputed that the loan is transacted through various Bank department. Also there is no doubt that respondents herein were reviewers and have recommended on the Security value for the additional plant and Machinery for the 1st respondent, and discounting a legal mortgage and security value for machinery for the 2nd respondent contrary to the Credit Policy. From the CMA typed proceedings, both respondents have stated that, their duty as reviewers was to verify if the loan was prepared in accordance with their policy. (See page 45 & 50 of CMA typed proceedings.)

Even in exhibit D5 collectively (Disciplinary hearing forms) the respondents confess that, they did not disclose the said defects neither to the authorizing officers nor supervisor's despite of knowing them. Now, I am of the considered view that, the respondents as officers of the bank had a duty of acting diligently and in good faith. But the respondents decided to act negligently in spite of knowing that, what they recommended was contrary to the policy. The fact that the loan

was transacted with various departments and others were not charged, can neither disprove what the respondents did nor, vitiate the validity of the reason for terminating the respondent. The same cannot exonerate the respondent from their liability. I thus fault the arbitrator's finding that the applicant had no valid reason for terminating the respondents.

As regard to the 2nd issue, it was the CMA's finding that, termination was procedural unfair on the reason that, the respondent was not afforded with a right to appeal within the applicant's higher management. The applicant's counsel argued that it was not a mandatory requirement of the law for the employer to entertain appeal, and the procedure should not be applied in a checklist fashion whereas, the respondents' counsel contended that the applicant denied the respondents a fair hearing just because they were not given a chance to appeal within the institutions.

While examining the records I came across exhibit D6 (termination letter) signed by the Managing Director within which, the respondents were informed of their right to appeal to the CMA if aggrieved with the termination. There is no proof of the policy or regulations from the respondents which states that, the appeal must be within the applicant's higher authority. I depart with the arbitrator's finding that termination was procedural unfair. It is apparent from records that respondent were afforded with a right to be heard, this is reflected from exhibit D1 letter to show cause, D2 respondent's reply, D4 Notice and D5 Disciplinary Hearing forms. As stated by the applicant's counsel, procedure should not be applied in a checklist fashion as stated in the case of **Justa Kyaruzi v. NBC** Rev.No.79/2009. Under the circumstances, I find that

the applicant complied with procedure for termination. Therefore, I fault the arbitrators finding as regard to the same.

Concerning the relief entitled to the parties, Since, this court has found that the applicant had valid reason for termination, and had complied with the procedures for termination hence termination was fair both substantively and procedurally, I thus quash the arbitrator's order of 24 months' compensation for unfair termination.

On basis of the above finding, I find the application have merit. I hereby quash and set aside the CMA's award.

Z.G. Muruke

JUDGE

27/08/2021