IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

LABOUR REVISION NO. 974 OF 2019

(Originating from Labour Dispute No. CMA/DSM/KIN/R.38/18/21)

BETWEEN

VICTORIA FINANCE PLC ..... APPLICANT

VERSUS

JOHN CLEMENT MWAKASONDA..... RESPONDENT

JUDGMENT

Date of Last Order: 10/09/2021

Date of Judgment: 29/10/2021

I. ARUFANI, J.

The applicant nocked the door of this court urging the court to call for proceedings and the award of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/KIN/R.38/2018/21 (hereinafter referred as the CMA), revise and set aside the award delivered on 12th December, 2019. The application is supported by the affidavit deposed by Hermenegild Kayigi, Principal Officer of the applicant and in rebuttal the respondent filed in the court the counter affidavit deposed by him.

The genesis of the matter as can be recapitulated from the record of the matter is to the effect that, the respondent was

employed by the applicant as a Loan officer with effect from 12th November, 2012 and on 24th April, 2015 he was promoted to the position of being a Credit Supervisor. On 6th December, 2017 the respondent was terminated from his employment on ground of gross misconduct that he acted dishonestly and in breach of trust in sanctioning the loan to two clients namely Rahabu Ernest Rubago and Fredrick Raymond Kitundu and caused financial loss to the applicant.

The respondent was dissatisfied by the decision of the applicant and referred the dispute to the CMA which found the termination was made on unfair reason. The Arbitrator awarded the respondent the sum of TZS 22,062,850/= being twelve months' salary compensation for unfair termination, severance pay, unpaid leave and unpaid salary. The applicant was aggrieved by the award issued by the Arbitrator and is now beseeching the court to call for the proceedings and award from the CMA, revise and set them aside.

When the application came for hearing the applicant was represented by Ms. Bora Alfred Nicholous, learned advocate and the respondent was represented by Mr. Jerry Jeremiah Kahema, learned advocate. The issues the applicant wish to be determined by this

application as set up at paragraph 19 of the affidavit supporting the application are eleven which the counsel for the parties prayed and allowed to argue by way of written submission. I commend both sides for their industrious submission they have filed in the court which will simplify the work of the court in determination of this application.

The counsel for the applicant prayed for the affidavit in support of the application to form part of his submission. He argued in relation to their first issue for the revision that the law under section 37 (2) (a) and (b) (i) of Employment and Labour Relations Act, CAP 366 RE 2019, (herein after referred as the ELRA) provides that employer has a burden to prove that termination was on valid and fair reason. He supported his argument by referring the court to Rules 8 (1) (d) and Rule 9 (4), (5) and 12 (1) of Employment and Labour Relations (code of good conduct) Rules, GN. No. 42 of 2007 and stated that, the reason should not only be fair but also sufficient serious to justify termination of employment of an employee.

He submitted that the arbitrator wrongly decided that the applicant had no valid reason for termination of employment of the respondent basing on the applicant's Credit Operating Procedures of

2015 only. He argued that the arbitrator stated the respondent being the applicant's employee was guided by Credit Management Policy of 2016, Guidelines for Disciplinary, Incapacity and Compatibility Policy and Procedure and schedule to GN. No. 42 of 2007.

The applicant's counsel argued further that, in the course of doing his work the respondent contravened section 1.3.1 of their Credit Operating Procedures of 2015 which provides that; '*Collateral verification shall be carried out by loan officer in order to establish whether collateral pledged has greater value than the loan amount applied and whether the ownership of that collateral is clear and can be documented easily.'*

He went on arguing that, the respondent contravened the applicant's Credit Management Policy of 2016, which states at its section 4.3 (2) states that; *The credit officer/loan officer is responsible for day-to-day management of customers relationships ensuring coordination, execution and monitoring of extension of credit, from early consultation through approval to maturity, including ensuring complete, accurate and balanced assessments of risk in the credit.* He stated that the respondent contravened section 5.10.2 of

Human Resource Policy of 2016 which was admitted in the matter as an exhibit.

The counsel for the applicant submitted that, the respondent acted negligently and dishonestly by accepting sales agreement of the land property belonging to Rahabu Ernest Rubago while there was title deed of the said property. He stated the respondent intentionally ignored essential information of credit reference bureau and facilitated fictitious registration of lien motor vehicle No. T677 DHZ. He argued that, if the applicant could have acted diligently then he would have discovered that, there was a title deed for a collateral pledged as a security for the loan by Rahabu Ernest Rubago and she has another loan with Tanzania Postal Bank, hence she was not reliable client to the applicant. Counsel the applicant cited in his submission Rule 12 (3) (d) of GN. 42 of 2007 together with the case of **World Vision Tanzania v. Charles Masunga Maziku**, Rev. No. 7 of 2014 found in [2015] LCCD 56 where it was held the rule or standard regulating employment requires an employee to act in good faith when performing his duty.

The counsel for the applicant joined issues number 2, 3 and 5 and argued that the arbitrator wrongly observed that, the time for

training of Dun & Bradstreet Credit Bureau system was not enough as the training was conducted in December and the loan was issued in January, 2017. He argued that the respondent was aware of the system and the system has been used by the applicant for a long time as testified by DW4. One may ask if the training was done in December 2016 how did the respondent himself conduct search in the system in 9th December, 2016 as per exhibit D 11. He added that the arbitrator's decision based on extraneous considerations and he failed to consider the positions of the Law and the evidence tendered by the applicant.

As regard to the 4th and 6th issues, the applicant's counsel argued them collectively and stated that, in terminating employment of the respondent the applicant adhered to all the procedure as required by section 37 (2), (c) of the ELRA. He submitted it was inappropriate for the arbitrator to award the respondent the sum of Tshs. 22,062,850/= basing on his finding that termination was substantively unfair. He stated the award was contrary to Rule 32 (5) of Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007 and prays the application be granted.

Responding to the applicant's submission, the counsel for the respondent prayed to adopt the counter affidavit filed in the court to oppose the application to form part of his submission. He argued that sanctioning loans is not part of the respondent duties as his job description is silent in regards to the same. He argued that, as per the Credit Operating Procedures of 2018 the procedure of sanctioning loan was within the mandate of the Credit Committee to wit the branch Manager, Senior Credit Officers and Company directors depending on the amount of loan to be issue.

He submitted that, under the Credit Operating Procedures of 2018, the duty of approving loan was vested on the Chief Operating officers and not to the respondent. He contended that, even the allegations of ignoring the essential information in the credit reference bureau, the respondent's job description did not state who should print or not print the credit reference bureau. He contended further that, according to Section 2.75 and 2.76 of the Victoria Finance Credit Operating Procedures 2018, all the credit committee were subjected to credit reference bureau print out. He stated they were given all the mandate to access the system, and as a committee

to sanction loan as provided by the applicant. He submitted it was not only the respondent who was responsible as stated by the applicant.

As regards to the claim of facilitating fictitious registration of a lien motor vehicle number T677 DHZ pledged as collateral, the counsel for the respondent submitted that the applicant have failed to adduce any evidence to prove that the card was fictitiously registered. He further argued that, the arbitrator was correct to decide that termination was unfair as the respondent was never availed with the Credit Management Policy, 2016 and Human Resources Policy 2016.

Furthermore, the respondent's counsel argued that, the Credit information system was introduced in July 2016 and the staff were only afforded with the user's name and password but the training was conducted in December, 2016 being two months from when the loan was issued to the said clients. He stated that shows the time for training was not enough for one to be acquainted with the system, that is why even the applicant requested for statement from the Dun & Bradstreet and the system provider replied him by a letter dated 16th November, 2017.

The counsel for the respondent concluded his submitted by arguing that, the arbitrator was right into his finding that termination was substantively unfair and issued awarded accordingly. He referred the court to the case of **National Microfinance Bank v. Leila Mringo & 2 others**, Civil Appeal No. 30 of 2018 and prays for the CMA award be upheld.

In his rejoinder, the counsel for the applicant reiterated his submission in chief. In addition to that he submitted that, the credit committee acted on information delivered by the respondent who was a credit Supervisor. He stated that, the respondent holding that position, he was responsible in the whole process of granting loan to Rahabu Ernest Rubago and Fredrick Raymond Kitundu and other clients of the company as prescribed in his job description.

Further to that, he argued that the Credit Operating Procedure of 2018 which was cited by the counsel for the respondent, was neither tendered nor attached into the application as the same came into operation after the respondent was terminated. He argued that the proper document is Credit Operating Procedure of 2015, together with other policies in which the respondent had breached resulting to his termination.

The applicant's counsel contended further, that it is true that all the applicant's staff who are dealing with sanctioning of loan were given access to the credit reference bureau in client's loan application. However, the respondent was not the only Credit Supervisor in the applicant's office and he was also in the Credit Committee.

He argued that, June, 2016 is when the applicant engaged into a contract with Dun & Bradstreet Credit Bureau System, and the search was done on 9th September, 2016. He stated three months period was enough for the respondent and other staff to acquaint themselves with the new system. He submitted that, while searching the respondent negligently searched the name of Rahabu Ernest Rubago instead of Rahabu Ernest Rubago. The respondent misled the management with wrong information of the client as he found that she had no any loan from other institution. Upon inquiry the applicant was informed by Dun & Bradstreet Credit Bureau System with a letter dated 16th November, 2017 that the said client does exist since 16th March, 2015.

He distinguished the case of **National Microfinance Bank v. Leila Mringo & 2 others**, Civil Appeal No. 30 of 2018 on the reason

that, in that case termination was on ground of lack of good faith and gross negligence whereas, in the present case the respondent was terminated on ground of gross misconduct. Lastly, the counsel for the applicate insisted on the prayer he made in his submission in chief.

After carefully considered the rival submission from the counsel for the parties and after going through the records and applicable laws the court has found the issues for determination in this matter are as follows:-

i. Whether the respondent's termination was substantively fair?

ii. What reliefs the parties are entitled?

Starting with the first issue, it is the requirement of the law as provided under Section 37 (2) of the ELRA that for termination to be fair, the employer must establish that he has a valid and fair reason for termination and he adhered to the procedure for termination as provided under the law. This position has been emphasized in a number of decisions made by this court including the case of **Sharifa Ahemed v. Tanzania Road Haulage (1980) Ltd.**, Revision No.

299 of 2014, reported in [2015] LCCD 171 where it was stated that:-

"The well-established principle in law is that termination of employment which is not based on valid reason and fair procedure is unfair, Section 37 (2) of Employment and Labour Relations Act. The intention of the legislature is to require the employer to terminate employees only on valid reason and not at their own whims."

It was the arbitrator's finding that the applicant had no valid reason for terminating employment of the respondent. The applicant alleged they had valid reason for terminating employment of the respondent and on his part the respondent argued that, he was unfairly terminated as he was not the only person responsible for authorizing loan to the said clients. The court has found that, in this matter the respondent was found guilty of gross misconduct for failure to verify adequately the property of Rahabu Ernest Rubago and failure to register the applicant's lien to the motor vehicle of Fredrick Raymond Kitundu who was the applicant's client seeking for the loan.

Starting with the loan advanced to Rahabu Ernest Lubago, the court has found the respondent does not dispute the fact that he was

the one went to visit the client for the assurance of the collateral, and he was satisfied only with the sale agreement as he had no further doubt as the client was his neighbor. It is also undeniable fact that, the respondent was the one conducted inquiry as regard to the client's loan status through D & B Credit System, and according to exhibit D11 the report indicated that the said client had no any loan, contrary to the proper information obtained from D & B Credit System report as requested by the applicant after the said client's failure to pay his loan. The latter exhibit D12 revealed that the said client's information still exists in their repository since March, 2015. That means the client had other liability from other financial institution. Hence, the client was unqualified to be afforded with the loan.

Regarding Fredrick Raymond Kitundu, the applicant alleged that, the respondent failed to do registration of a lien motor vehicle No. T677 DHZ belonging to the said client. The respondent does not deny the fact that he was aware of the said procedure of registering a lien. However, he opted not to do the same despite of knowing the risk of failure to do registration of the lien.

I have keenly examined the records and it is undisputed that, the loan processing involved several officers to include the loan officers, Credit supervisor, Chief Operations Officer, and Managing Director. In this aspect this court is of the distinct view with the arbitrator's finding that the whole Credit Committee were responsible for the said negligence and not only the respondent as alleged by the applicant. From the evidence on record, it is apparent that the respondent is the one who printed the D & B report which provided false information which resulted into authorization of the loans.

The respondent as the applicant's officer, had a duty of acting with high degree of honesty and diligence in his capacity despite the fact that he was not the final person to authorize the loan. The respondent ought to have acted responsibly and foreseen the outcome of his negligence to the applicant's business. The essence of acting diligently and honestly was insisted in the case of **NMB Bank PLC vs. Andrew Aloyce,** Rev. No. 1 of 2013 [2013] LCCD 84] where Hon. Rweyemamu, J., (as she then was) stated that:-

> *"The applicant is the banking industry, where honesty by its employees' is its key stock in trade, without it, its business would collapse with dire consequences, not only to the employer and its other employees, but business also to the*

economy at large. It is true therefore, that the nature of the bank 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 is committed in any less honesty sensitive industry."

The court has found the arbitrator in his reasoning stated that, the offences resulted into termination of employment of the respondent provided under the Credit Operating Procedures, 2015 to wit offence provided under section 1.3.1, 1.3.11 and 2.7.1 were not in existence as the applicant failed to supply to the CMA a copy of the said policy. It is true that the applicant had a duty to submit the alleged policy to the CMA to enable the decision maker to make reference to the alleged offences and get assurance of its existence.

However, the court has found the testimony of the respondent as recorded at page 41 of the typed proceedings shows he admitted to have known the breached policies as they appear in his termination letter and that being the applicant's employee had a duty to comply with the same. Now, since the respondent was aware of the policies and knew that he was supposed to adhered to the same in his daily work performance, what derived the arbitrator to find the offences

leveled against the respondent were not in existence. To the view of this court the arbitrator misdirected himself to find the offences leveled against the respondent were not in existence.

The court has arrived to the above finding after seeing that, the respondent also admitted in his testimony at page 39 of the CMA typed proceeding that he was aware of the D & B Credit System. He said they were trained to use the system and it was not his first time to use the system to get the client's information. On that regard he was in a position to know what information were supposed to be entered in a system for getting proper information of a client.

The fact that the loan is transacted by a loan committee, the same does not vitiate the fact that the respondent as an individual did not act responsibly in performing his obligation, hence he cannot be exonerated from liability as the information delivered by him resulted to the applicant to enter into a loss. Consequently, the court has found termination of employment of the respondent was substantively fair as the applicant had valid and fair reason for termination of employment of the applicant. Therefore, the arbitrator erred in finding the applicant had no valid reason for terminating employment of the respondent.

Coming to the second issue, the court has found the CMA awarded respondent the sum of Tshs. 22,062,850/= being 12 months' salary compensation for unfair termination, 5 years severance pays, 19 days leave and 6 days salary. Having found termination of employment of the respondent was substantively fair the application of the applicant is hereby granted and the award of the CMA is accordingly revised. In the premises the order of payment of 12 months' salary compensation, and 5 years severance pay are hereby set aside as the respondent was fairly terminated from his employment after being found guilty of misconduct. The respondent be paid other reliefs ordered by the CMA if the same are yet to be paid. It is so ordered.

Dated at Dar es Salaam this 29th October, 2021

I. Arufani

JUDGE

29/10/2021

Court: Judgment delivered today 29th day of October, 2021 in the presence of Ms. Halima Semanda, Advocate for the Applicant and in

the presence of Mr. Jerry Kahema, Advocate for the Respondent. Right of appeal to the Court of Appeal is fully explained.

I. Arufani

JUDGE

29/10/2021