IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

REVISION NO. 235 OF 2020

BETWEEN

FRANCIS MALLOMO ..... APPLICANT

VERSUS

NMB BANK PLC ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

By a notice of application lodged under the provisions of Section 91(1)(a),(b),(c) and Section 94(1)(i) of the Employment and Labour Relations Act, 2004, as amended ("ELRA"), Rule 24(1), 24(2)(a),(b),(c),(d),(e),(f), 24(3)(a),(b),(c),(d), Rule 24(11)(c) and Rule 28(1)(c),(d)(e) of the Labour Court Rules GN. 106 of 2007 ("the Rules"), the applicant, Francis Mallomo has lodged this Revision against the decision of the Commission for Mediation and Arbitration ("the CMA") in Labor Dispute No. CMA/DSM/ILA/218/19/163 ("The Dispute"). In his Notice of Application as well as the Chamber Summons, the applicant has moved the court for the following orders:

(a) That this Honourable Court may be pleased to call for and examine the proceedings and the subsequent award of the Commission for Mediation and Arbitration of Dar es salaam at Ilala

in Labour Dispute No. CMA/DSM/ILA218/19 By Hon. Faraja dated 11/5/2020 in order to satisfy it self on its appropriateness.

(b) That the Court may be pleased to revise and set aside the said award and reinstate the Applicant

(c) That the Court be pleased to grant any other relief it may deem fit and just to grant

On their part, the respondent opposed the application through a notice of opposition lodged under Rule 24(2) of the Rules, praying that the application be dismissed for lack of merits. By an order of the court dated 06th September, 2021, the application was disposed by way of written submissions. The applicant's submissions were drawn and filed by Ms. Stella Simkoko, learned advocate while the respondent's submissions were drawn and filed by Mr. Paschal Kamala, learned advocate.

Before I venture into determining the merits or otherwise of this application, it is prudent that the brief background that has led to the current application be narrated. From what is gathered in the records of both the Labor Dispute and this Revision, it appears that the applicant was employed by the Respondent as a relations manager with effect form 1/4/2016. His duties included receiving Agribusiness Credit Applications from various customers, review the same before submitting them to the other departments for their comments. The processed application the lands at the Wholesale credit Committee as it final destination for the final decision.

At some point in time, in 20th October, 2018, a company with the name of Bens Agro Star Co. Limited requested a letter of credit for a sum of USD

2,330,000/-. The facility was meant to fund importation of cotton pesticides. It is the applicant herein who handled the application and after preparation of the Credit Application, he submitted to the Credit Manager who passed it to the Credit analyst. It is in due course of processing the application that the cause of the dispute arose. As per the EXD7, the Credit analyst recommended to decline the application due to a number of reasons amplifying a bad credit history of the applicant with the bank including defaulting payments, sell of collateral without prior notification to the bank and pledging a house which was owned by another person not the guarantor. The applicant was also accused of preparing another credit facility for the same person, discussed it in a meeting with the Credit Manager and the Credit analyst, and tabled it to the Credit Committee who declined the facility on the 19/11/2018 with a condition to re-look if there is cash cover to support the requested amount.

There was a warning from the Legal Department to keep disbursement process on hold pending from confirmation of allegation of forged collateral documents which were later on 15/01/2019 confirmed to have been forged. On the 18/01/2019, the applicant, despite the warning, prepared a Draw Down request memo requesting Credit Committee to authorize issuance of USD 450,000/- to the same company. The request was submitted to the Credit Department for submission to the Credit Committee. It was in due course of this process that the applicant was charged and eventually terminated, a termination which he claims to be unfair.

According to the charge sheet served to the applicant by the respondnet, he was charged with the following offences:

i. Violation of Section 15.15 of the Human Resources Policies Manual 2018, under sub section 3.3.1 of the Schedule of Offences, for abuse of office/authority as revealed in the processing of the Letter of Credit facility in question by willfully ignoring legal advice, valid opinion from Credit Analysts and Credit Administration Unit.

ii. Violation of Section 15.15 of the Human Resources Policies Manual 2018, under sub section 1.18 of the Schedule of Offences for refusal to obey written lawful instructions from legal department of not proceeding with disbursement process until legal documentation of the collateral is in order.

The applicant lodged his defence (EXD8). A disciplinary hearing was conducted and the applicant was eventually terminated. Aggrieved by the termination he appealed to the employees Disciplinary Appeal Committee where his appeal was dismissed. It is owing to the outcome of the said appeal that he approached the CMA and lodged the dispute praying for the relief of reinstatement and damages. The CMA was not convinced by the applicant's complaint that the dismissal was unfair, it proceeded to dismiss the dispute hence this Revision on the following legal issues:

(a) Whether the Arbitrator erred in facts or in law to hold that the reason for the termination was fair and was justified to condemn me for dishonest

(b) Whether the Arbitrator had properly analyzed the evidence tendered

(c) Whether in the circumstances of this case I had abused the office/authority

(d) Whether the Arbitrator erred in facts or in law to hold that the procedure was fair and whether I was heard on the offence of dishonest.

Having analysed the legal issues as set out in the affidavit, they all narrow down to one issue, whether in the arbitration proceedings, there was sufficient evidence to prove that the termination of the applicant was fair both procedurally and substantively as held by the CMA before dismissing the dispute. My duty is therefore to examine the records and see whether the decision of the CMA was correct or whether the termination of the applicant was unfair procedurally and/or substantively.

It is trite law that in labor disputes, the yard stick to justify the termination of an employee by the employer **is fairness** in both the substance and the procedure. Article 4 of the I.L.O Convention No. 158 of 1982 stipulates that a dismissal is unfair if the employer fails to prove that the reason for the dismissal is a fair reason based on the misconduct or incapacity of the employee, or is based on the employer's operational requirements, and that the dismissal was effected in accordance with a fair procedure.

Starting with the substantive part of the termination, in this part, the employer is required to prove that the substance of the acts/conducts which led to the termination of the employee justify the termination. Rule 12 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. /2007 ("The Code") provides that:

"12(1) an employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider:

(a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;"

(b) if the rule or standard was contravened, whether or not-

(i). it is reasonable;

(ii) it is clear and unambiguous;

(iii) the employee was aware of it, or could reasonably be expected to have been aware of it;"

According to the employer's charge sheer (EXD7), the employee was charged with the following offences:

iii. Violation of Section 15.15 of the Human Resources Policies Manual 2018, under sub section 3.3.1 of the Schedule of Offences, for abuse of office/authority as revealed in the processing of the Letter of Credit facility in question by willfully ignoring legal advice, valid opinion from Credit Analysts and Credit Administration Unit.

iv. Violation of Section 15.15 of the Human Resources Policies Manual 2018, under sub section 1.18 of the Schedule of Offences for refusal to obey written lawful instructions from legal department of not proceeding with disbursement process until legal documentation of the collateral is in order.

As per the cited rule of the Code, (12(1)(a)) the rule or standard exist in the employer's HR manual submitted as EXD6. The next issue is to see whether there was justification for the employee(applicant) to contravene the manual.

I had taken time to go through the Human Resource Manual of the bank (EXD6), the applicant was charged with two offences, and the first offence was under sub section 3.3.1 of the Schedule of Offences. There is no offence under the cited 3.3.1 but instead there is an offence of Abuse of Offence as charged under sub-section 3.1. The penalty that is provided for this offence is Termination. The applicant was also charged with the offence of refusal to obey written lawful instructions from legal department of not proceeding with disbursement process under sub-section 1.8 of the Schedule of Offences. This offence carries a penalty of Final Written Warning for the first offence, Comprehensive Final Written Warning for the second offence and a Termination for a Third Offence. It is now important to see if the two offences were proved.

To be begin with the offence of abuse of office, the term abuse of office means acts or omission on the part of the official when the powers granted to him are exercised not in accordance with laws and other legal acts but for self-seeking purposes or for other personal considerations. The question whether the applicant abused his office. In the Charge sheet, it is stated clearly that the applicant was accused of preparing another credit facility for the same company that was under investigation on allegation of forged documents. Nevertheless he processed the application, discussed it in a meeting with the Credit Manager and the Credit analyst, and tabled it to the Credit Committee who declined the facility on the 19/11/2018.

As per his defence, and not necessarily disputed by the respondent, the applicant was processing the credit facility; he admitted to have received the advice from the legal department that he should halt the processing of

the loan. He however proceeded with processing part of the amount and tabled it before the credit Committee. His defence as to why he did so was a long political story not backed up with any evidence. His story that there was a shortage of cotton pesticide in the country was just unsubstantiated to have formed evidence in such serious allegations.

During arbitration, the employee/applicant acknowledged to have received legal opinion from legal Department requesting business to stop all disbursement process until they get a clear notification form Registrar of Title. His defence on continuation with the disbursement process was that it was very important to issue the Letter of Credit on time to save the situation because the company was the only company that was awarded tender to supply cotton pesticides in the country by the Cotton Board.

On the collaterals expected to be forged, during disciplinary proceedings he testified that the employees defence was that the requested reduced amount would have been fully covered by existing securities. Further that he forwarded his request to Wholesale CredCo which have the power to advice a better way on solving the matter to legal department taking into consideration of the prevailing situation that there were no a drop of cotton pesticide in the country. That they got some assurance from Cotton Board that the pesticide would arrived on time if the Lac was opened on time and that he was convinced that the disputed collateral can be put aside and continue to issue Letter of Credit.

The applicant also put a defence that the legal department was only an advisory body and the department which approved facilities was the credit department hence there was no lawful order disobeyed. Further that he

indicated all the information on the discrepancies of the title handed to the bank and leave the bank to decide on his request. But he also admitted that even the Credit Committee issued an order stopping him from processing the loan.

According to the evidence of DW1, the Bank had informed the applicant that the credit should not be issued to the Company because of previous bad conduct. The applicant/employee was made aware of it and he still proceeded to table a proposal for the company to be issued with credit facility on the above defence.

On the evidence above, I am satisfied that the evidence adduced by the applicant during trial as well as his defence at the disciplinary proceedings did not suffice to defeat the defence evidence. The substance of evidence of abuse of office adduced by the employer was more probable that the offence existed than what was put forth as the applicant's defence. The offence was therefore proved to the required standards.

Going to the next offence under sub section 1.18 of the Schedule of Offences, the offence is refusal to obey written lawful instructions from legal department of not proceeding with disbursement process until legal documentation of the collateral is in order. I have noted that in his defence, the employee/applicant acknowledged to have received legal opinion from legal Department requesting business to stop all disbursement process until they get a clear notification form Registrar of Title. His defence was that he continued with the disbursement process because it was very important to issue the Letter of Credit on time to save the situation in the country. Further that the legal department just issued

an advisory note because the Credit Committee is the one with the last say on disbursement of funds. Unfortunately, the applicant's evidence did not have any back up. It was just a lot of stories from the bar. As for me, since he acknowledged to have received the warning from the legal department and the credit committee, admitted to have proceeded with disbursement process, then the offence was proved to the required standard as the defence carried no weight. Therefore on the second offence as well, it was well proven. At this point, it is safe to conclude, which I hereby so do, that the applicant's termination complied with the provisions of Section 37(2)(a) &(b)(i) of the ELRA.

The next question, having determined that the termination was fair substantively is to see whether the procedure was fair. The issue to be proved in the case of fairness of termination procedurally is whether the employer, in the process of formulating its decision to terminate the employee, has adhered to the laid down procedures. The Courts will, in this case, see whether the employer failed to give the employee a genuine and proper opportunity to respond to the allegations and or notice of the reason for the dismissal.

In her submissions, Ms. Simkoko argued that the respondent did not prove that the applicant was heard by a duly constituted disciplinary hearing committee. That according to their HR policy (EXD6) item 15.6.2, the appropriate Disciplinary Committee composed of Chief Risk Officer The Chief Finance Officer, the Chief Operating Officer , Chief of Retail Banking (CRDB), Legal Manager Litigation Dar-es-salaam Zonal Manager and ER officer who is not part of the proceedings. The policy dictated that the CRO

is the Chairperson of the said Committee and shall preside at all meetings of the Committee and in his absence the Committee shall appoint the Chairperson among members present.

She pointed out that the Committee in the applicant's case was Chaired by the Treasurer who is not amongst the members and no justification of her attendance was recorded on EXD9. Further that the termination was signed by the treasure in her capacity as the treasurer and not as acting Chairperson. That DW2 came to testify on fairness of the termination while he was not part of the disciplinary committee and the composition of the committee vividly provides that the ER Officer (Secretary) is not part of the committee.

In his submissions to oppose the ground of procedural unfairness, Mr. Kamala first argued that the Applicant was satisfied with disciplinary process as the allegation of faulting the procedure was never part of the Applicant's evidence. Thus, the Applicant's submissions on this issue is a statement from the bar not supposed by oral evidence. That a matter that was not raised at first instance cannot be raised on appeal.

As an alternative to his argument, he replied on the substance of the issue by arguing that the respondent followed the required procedures. That DW2 was tasked to make enquiries on the allegations whereby it was discovered that there was violation of banking policies and lawful instructions. As a result of these breach, the Applicant was required to show cause why disciplinary action should not be taken against him. He wrote a letter to show cause, but the Respondent proposed a further disciplinary action to be carried out. The Applicant has never challenged

the composition of disciplinary committee at any point of time and that after going through disciplinary process, the Applicant was found guilty of the offences.

Mr. Kamala however admitted that it was prudent to have a chairperson from another department because the Chief Risk Officer was head of department which conducted investigation. He was quick to take a defence that this is a trivial mistake which cannot override the substantive aspect of the offences committed. He cited the case of **Deus Wambura v. Mtibwa Sugar Estate Ltd, Revision No. 3 of 2014,** (unreported) whereby the employee instituted the matter at CMA complaining that she was not given a right to cross-examine witnesses during the disciplinary hearing. CMA held that there was a fair reasons for termination but awarded the complainant 3 months compensation on the ground that indeed she was not given right to cross examine witnesses at the disciplinary committee. The employee filed a revision at the Labour Court for being compensated 3 months instead of not less than 12 months as required by Section 40(1) of Cap. 366. Rweyemamu, J as she then was held as follows:-

> *"In that case, an award of compensation in a sum equal to 12 months salary was quashed and replaced with an order of compensation in the sum equivalent to 6 months' salary. See also Salum Omary Vs. The Director General ,NHC, Revision 401/2013 (LC main registry) The rule of practice deductible form the above is that, the decision of how much to award as compensation for procedural unfairness should reflect the extent and consequence of breach of the of the required procedures"*

That the Honorable Judge went on to hold that:-

Now in our instant case, the Arbitrator granted 3 months salaries compensation on ground that there was minor discrepancy on procedure, namely; "that the applicant was not given an avenue to cross examine witness in the disciplinary meeting". But, the CMA proceedings contain record of what transpired on appeal at the ADB, it shows that the faulted procedure-failure to afford right to cross examine witnesses, was corrected because Deus was afforded that right. Under the circumstances, I find that the award of any amount of compensation was on the evidence on record unjustified, because the procedure that had missed at Disciplinary Committee was corrected"

He submitted further that the above case also quotes the case of **Mohamed Mwenda& 5 Others v. Ultimate Security Ltd Revision 440/2014 LC** (Unreported), where the Court concluded that:-

"grant of remedy under section 40(1) of the ELRA is discretionary. In the circumstances of this case, grant of the compensation was not illegal, because even though there was a degree of unfairness in the procedure, the flouted procedure was not fatal to justify grant of compensation of 12 months' salary. The fundamental requirements of procedural fairness i.e.; disciplinary proceedings were conducted, the employee was granted the right to be heard; only missing was use of a prescribed form – a minor and in this case, inconsequential discrepancy. Under such circumstances, grant of 12 months' salary was unjustified.

From the above authorities, he argued that the Applicant was procedurally fairly terminated. If there was a procedural irregularity, it cannot override substantive part and prayed for the dismissal of this revision.

In rejoinder, Ms. Simkoko denied the fact established by Mr. Kamala that the applicant was satisfied with the disciplinary process. She argued the reason why the applicant referred the dispute to CMA was unfairness of reason as well as the procedure for termination. On the cited cases, she distinguished to the current situation on the ground that in those cases, the employee had committed the acts alleged with.

I have gone through the disciplinary proceedings (EXD10) and the records of the CMA, I have noted that the DW2 was not part of the members of the Disciplinary Committee but she attended the disciplinary proceedings. It may appear that she went to the CMA and testified on what had happened in the hearing hence unless the applicant is challenging her competence as a witness or the authenticity of her evidence, the mere fact that she was not a member of the committee is not a reason to invalidate the proceedings. If she was sitting in the committee, then she was the competent witness to testify on the fairness of the dismissal by availing the CMA with what exactly transpired in those proceedings.

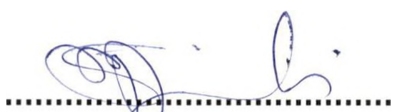
On the fact that the Chief of Operations was not a Chairperson of the Disciplinary Committee, I have considered this argument and am inclined to agree with the argument raised by the respondent, that it was prudent to have a chairperson from another department because the Chief Risk Officer was the head of department which conducted investigation. It would have been fatally unfair if the investigating officer sat in the

disciplinary committee as the adjudicator because that would breach the principle in the legal maxim of *"Nemo Judex in Causa Sua"* no man can be a judge of his own cause. That would have defeated the fundamental principles of natural justice. I would have upheld this argument if there was no plausible explanation as to why the meeting was chaired by a person other than the Chief Risk Officer. But the justification advanced by Mr. Kamala makes sense and it was only prudent that the Chairperson was changed.

On those findings, I find that the employer complied with Rule 13 of the Code on the fairness of the procedures, the employee was notified of the allegations and there was no complaint that he didn't understand the language. He was afforded a reasonable time to prepare, hearing was within reasonable time, evidence was presented and he had time to defend himself and the decision was communicated to him. He was even accorded a right to appeal within the internal procedures before he approached the CMA. The termination was hence procedurally fair.

In conclusion, I see no reason to fault the award of the CMA. The application lacks merits and it is hereby dismissed in its entirety.

Dated at Dar-es-salaam this 20th day of September, 2021.



S.M. MAGHIMBI.
JUDGE.