IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 257 OF 2020

(ARISING FROM LABOUR DISPUTE CMA/DSM/ILA/592/15/927)

EXIM BANK TANZANIA LIMITED.....APPLICANT

Versus

BAHATI AGREY MWAKYOMA AND 2 OTHERS.....RESPONDENT

JUDGMENT

16th September 02nd November 2021

Rwizile J.

This application for revision is against the award of Commission for Mediation and Arbitration in respect of Labour Dispute No. CMA/DSM/ILA/592/15/927. The applicant is asking this court to revise the award in the following terms:

1. That this honourable Court be pleased to examine, revise and set aside the whole award of the Commission for Mediation and Arbitration, Dar es salaam Zone at Dar es salaam in labour Dispute No. CMA/DSM/ILA/592/15/927 between Agrey Mwakyoma

& 2 Others v. Exim Bank Limited before Hon. William, R., Arbitrator dated 20th May 2020

2. That this Honourable Court be pleased to make any other orders as it may be just and convenient in the circumstances of the case.

The application is supported by the affidavit of Edmund Mwasaga the applicant's Principal officer. Paragraph 4 of the affidavit contains four legal issues for determination in the following terms; -

i. Whether it was proper for the Honourable Arbitrator to rule that it was not possible and difficult for her to establish a fact of which the said fact was never disputed during the proceedings.

ii. Whether it was proper for the Honourable Arbitrator to confuse reasons for termination as the reasons was gross negligence but the Honourable arbitrator ruled as if it was under performance.

iii. Whether it was proper for the arbitrator to hold that the procedure was not followed with the evidence

tendered shows that the procedure was dully followed.

iv. *Whether the Honourable arbitrator exercised her discretion judiciously that is to reach at a just and equitable decision in relation to the circumstance of the case.*

The facts behind the dispute in brief is that, the respondents were employed by the applicant for unspecified period of time. On 18th September 2015 the relationship between the parties became bad. The respondents were charged in the disciplinary hearing and convicted of gross negligence were terminated. They were dissatisfied with the applicant's decision, and therefore filed a dispute at the Commission claiming for the reliefs to wit 36,905,382/=, reinstatement or payment of compensation for unfair termination, notice, annual leave, severance pay, salary arears and a certificate of service.

The same was determined on their favour. The applicant was directed to reinstate them without loss of remuneration by paying the claimed terminal benefits.

The amount of 55 months and 12 days of September 2015 and 20 days of May 2020, which in total for all respondents, the sum of 133, 151, 458/= was to be paid. Aggrieved by the award, the applicant filed this application.

The applicant was represented by Mr. John Ignace, learned advocate, whereas the respondent was represented by Mr. Ruben Robert, learned advocate. The application was disposed of by way of written submissions.

The applicant's Counsel submitted that the essence of the applicant's complaint is that the respondents carried out modification of the cheque payment details which ought to be paid to the Tanzania Revenue Authority by BC Mining Co. Limited. According to the learned counsel, the sum of 3,271,118, 033.00 was diverted and paid to M\S Spedag Tanzania Limited in its account maintained at KCB Bank Tanzania Limited.

The counsel argued that the 1st respondent alleged that he was authorized by Khilna Mamlan to do so and allowed the transaction pass for final payment. He said, there is no evidence to prove that they were so authorized. In his view, the evidence of Pw1 and Pw2 is hanging and

leaves a lot of doubt. Therefore, the same justifies, that there was a valid reason for their termination. Khilna Mamlan was not called by Pw1 to corroborate his evidence. The award, in the view of the learned counsel is based on the allegations made by Pw1.

The counsel submitted further that Pw2 was given a chance to call Vicent Kulaya at the disciplinary hearing, to support his finding but did not do so. The arbitrator, it was submitted, confused issues by holding that the payee forms for TRA and its account details were not presented before the commission. The counsel argued that theft of the money occurred as a result of modification of the payee's name and account details.

This, he said was confirmed by the Arbitrator who held that KENEX showed that TRA was the payee and his account was also disclosed. It was further submitted that this matter involved fraud. The respondents, he argued as well, that were also prosecuted at Kisutu Resident Magistrates' Court for perpetrating fraud. He averred that the arbitrator's finding is based on illegality and dwelt on irrelevant considerations. That is, it was submitted, he failed to analyse the period of employment of the respondents as they worked for a long time. They

were supposed to perform their duties with due diligence, vigilance and care. According to Mr. Ignas, they were not expected to change the payee's name and account which existed in the system. They had to seek for an approval or report the incident to their supervisor.

Furthermore, it was submitted, the investigation report which is exhibit D9 not a hearing proceeding. In his view, it was wrong for the arbitrator to hold that there was nothing in the report which dealt with interrogation of the respondents. Also, he argued, they signed hearing forms and the minutes of the meetings of the disciplinary hearing. Given the situation, the counsel was clear that the respondents were terminated for fraud. They were prosecuted in criminal offences in court. In his further, argument, the learned counsel was of the view that, given the nature and circumstances of the applicant's business, it was wrong for the arbitrator to order reinstatement of the respondents, and payment of a total of Tshs. 133,151,458.00.

Opposing the application, Mr. Ruben submitted, that the issue that arbitrator there were valid reasons for termination for diverting payment of the amount of Tshs. 3,271,118,033, is a new ground not forming

party of the issues supporting this application. The counsel submitted that the affidavit supporting this application has four issues for determination. The above in his view does not feature. Therefore, he strongly argued that the same amounts to words from the bar which should not be accepted as held by the Court of Appeal in the case of **City Coffee Limited vs The Registered Trustees of Ilolo Coffee Group**, Civil Appeal No. 94 of 2018 at page 14. According to the learned counsel, parties should be bound by their pleadings. He said the ground cannot be traced from her pleadings and therefore should not be allowed as held in the case **Juma Jaffer Juma vs Manager, PBZ Ltd and 2 Others,** Civil Appeal No. 7 of 2002 at page 16**.** He was clear that the Arbitrator rightly found that the respondents were unfairly terminated basing on the following facts;

First, the amount subject to modification which led to termination is not Tshs. 3,271,118,003/= as submitted by the applicant. Dw1 at page 24 of the proceedings testified that the respondent modified transaction totaling Tshs. 1,291,218,012.5, then at page 26 paragraph 1, Dw1 testified that the loss was to the tune of 1.2 billion.

Second, at page 3 of the applicant's submission, it was said that the Commission held that the modification was done by mistake. He stated further that the evidence on record clearly establishes that modification was done by the respondents in conformity to the TT forms as given to them by their respective supervisors. He said, they were also orally instructed by the supervisors.

Third, he said, it is not in record that there was a burden shift from BC Mining Ltd to the applicant to pay Tshs. 3,271,118,003 as submitted by applicant. In the view of the learned counsel, it is a new fact which cannot be considered by this court. **Fourth**, he added, the applicant's attempt to invite this court to take judicial notice of the decision of **Tax Revenue Appeal Board in income tax appeal No. 90 of 2016** is misconceived and an afterthought. He stated that this court is an appellate court. As such, it cannot act as a trial court to take judicial notice of the existence of any decision and proceed to fault the award basing on a decision which was not made available to Commission for consideration. Further, it was his submission, that this is the applicant's way of trying to introduce new evidence at this stage without adhering to Order XXXIX rules 27,28 and 29 of the Civil Procedure Code [CAP 33

R.E, 2002] as amplified in the case of **Ismail Rashid vs Mariam Msati**, Civil Appeal No. 75 of 2015.

The counsel, referred to section 39 of the Employment and Labour Relations Act, [Cap 366 R.E 2019], which explicitly states that the burden of proving fairness of the reason for termination lies on the employer.

The applicant, he said, alleged without proof that modification was done by the respondents, required written authorization from their authorizers. Dw2 testified that the changes made by the respondents required special permit or authorization. These, he went on saying, are allegations from the bar, since both Dw1 and Dw2 failed to tender any internal guideline to support their allegations. The witnesses, it was his view, equally failed to tender respondents' job descriptions and internal operating manual to support the assertions.

To add on that, he submitted, no witness from the IBD Department was brought to testify as to the modification procedure. Dw1 and Dw2, he said were from Human Resource Department and Risk Department respectively. Their oral testimony on the procedure for modification

therefore is hearsay, not reliable. Therefore, the applicant cannot shift her burden to the respondents, he submitted. He stated further that exhibit D9, an investigation report clearly indicates that all transactions were authorized. It was the applicant's witness, Mr. Reuben insisted, Dw2 tendered exhibit D9 which corroborates the respondents' evidence that the transactions in issue were duly authorized.

Regarding arbitrator's confusion, the counsel submitted that the alleged forms were not tendered to justify the position. It was strongly submitted that the argument is misconceived and without merit. The proceeding is in support of the Arbitrator's finding. Dw2, according to the learned counsel, testified that one Vincent Kulaya forged TT forms with M+R SPEDAG as beneficiary of the forged transaction as exhibit D17 Collectively. It is not true, it was argued, that the respondent did not dispute to have received the forged forms. For instance, he said, Rebecca Adamson (Pw2) clearly identified exhibit D17 collectively (TT Forms) as genuine. Further, he said, Pw2 testified that she was orally instructed by her supervisor one Vincent Kulaya to modify the KENEX system according to the TT forms (D17). In his view, this was also supported by Pw3, that she received TT forms from her supervisor one

Panna Chudasama with instructions to make changes to the TT form, which has M/R SPEDAG as the beneficiary. According to the learned counsel, Pw1 on the other hand, testified that physical TT form given to her by her supervisor one Khiliner Mamlan has M+R Spedag as beneficiary.

And that her supervisor directed her to make modification in the Kenex system to reflect the TT form she gave to Pw1.

On lack of interrogation of the respondent in the investigation report, the learned counsel was of the view that the same was one sided report as the respondent were not involved at all. It is not true, he held the view, that the respondents were terminated on fraud or theft as the applicant's counsel tries to assert. Termination letters, exhibit D8 collectively, show it was due for gross negligence.

Regarding procedural aspect, it was submitted, although the respondents were notified of the charges and a hearing, the procedure for termination was not fair as contemplated by the law. According to Mr. Reuben, it is because of the following reasons -

Firstly, the respondents were not involved in the purported investigation, they were not interrogated, as per evidence of Pw1, Pw2 and Pw3. **Secondly**, it was submitted that, the respondents were not availed with the investigation report for the purpose of fair hearing and that time was not enough to prepare for the hearing. Here, the learned counsel cited the case of **Exim Bank vs Jacquiline A. Kweka**, Revision No. 429 of 2019 at page 11. He was of the view that failure to avail employee with investigation report is tantamount to denying the right to be heard. **Thirdly**, it was submitted, there was no witness that testified at the disciplinary hearing as per evidence of Pw1 and Pw2. However, it was submitted, it is contrary to rule 13(5) of Code of Good Practice GN No. 42 of 2007 which requires employers' evidence to be presented at the disciplinary hearing.

Fourthly, it was the view of Mr. Reuben that the respondents were only asked questions at the disciplinary hearing and so were not given a chance to defend their case as held in the case of **Bolore Africa Logistics Tanzania Ltd vs Mgreth Luther Shubi,** Revision No. 473 of 2019 at page 11.

Fifthly, the learned advocate was of the view that, the respondents were not availed with the right to cross examine the applicant's witness at the disciplinary hearing as per the case of **Exim Bank** (supra).

Sixthly, the counsel submitted that the respondents were punished twice as the disciplinary action was taken and their employment terminated while there was a pending criminal case against them on the same offence. The respondents testified that before disciplinary documents were supplied to them, they were arrested. At the disciplinary hearing, he argued, Dw2 failed to tender original documents because they were held by the police. He tendered letters to and from police to prove the fact. As per exhibit D12, they were charged of offences of forgery and stealing. It was his view that double jeopardy is strictly prohibited by section 37(5) of the Employment and Labour Relations Act. This position, it was submitted, was reached in the case of **Bidco Oil and Soap Limited vs Robert Matonya & 2 Others,** Labour Revision No. 70 of 2009 and **Quality laboratory Tanzania Ltd vs Sahbani Hassani,** Labour Revision No. 24 of 2015.

In a rejoinder, it was submitted that, the lengthy respondents' submission contained misleading information. It was submitted that the applicant filed an affidavit which was adopted when submitting. The same, he commented contained grounds for which this application has to be determined. Therefore, there is no new ground raised.

As to taking judicial notice, it was submitted, the case of **Tax Revenue Appeals board** (supra), was to prove there was indeed proved theft and that it is in accordance with section 59 of the Evidence Act. Further, it was rejoined that the applicant discharged her duty as under section 39 of the ELRA, evidence in record is self-explaining. Taking judicial notice, it was added, is not as good as calling for additional evidence as per the Civil Procedure Code. Lastly, disciplinary hearing, it was submitted was, conducted after sufficient notice of over 48 hours as under rules 13(3) of the Code of Good Practice Rules.

After going through the rival submissions of the learned counsel, I think there are two major issues for determination, which are; *whether termination was both procedurally and substantively fair. And the*

whether respondents are entitled to the reliefs awarded by the commission

At law, termination is said to be fair if it complies with section 37 of the Employment and Labour Relation Act, which provides that: -

> *A termination of employment by an employer is unfair if the employer fails to prove-*
>
> *(a) that the reason for 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.*

It is resolute therefrom that for termination of employment to be considered fair, it should be based on valid reasons and grounded on fair procedure. This is to say, there should be existence of both, substantive fairness and procedural fairness of termination of employment as under section 37(2) of the Act. This is the duty cast on employers considering termination of the employees, it should not be done at the employer's will or pleasure.

The respondents were terminated for misconduct, that is they did not act in good faith and so were negligent. According to their termination letters, they acted dishonestly. It is in record that indeed, there was a change of payee's name and account that existed in the KENEX system, which as the result, there was diversion of funds to another payee.

The point to determine is whether the respondents were authorized to initiate the alleged modification. It is on record that the respondents were employed as Bank Officers as per exhibit A-1, employment contracts. It may follow therefore that they were supervising payee account. It was their duty therefore to lead evidence to prove, they were indeed duly authorized to initiate changes in the system. There is no such evidence in record. This infers that they were either negligent or acted fraudulently in performing their duties. Based on their experience, by any standard, the amount diverted is too huge to be simply dealt with. Authorization was, in the absence of evidence to contrary, inevitable. The respondents did not prove at the required standard that there was proper bank procedure which allowed them to do so.

I am, based on the evidence in the record, of the view that the respondents committed a serious misconduct which merited termination. Given the nature of the banking business, dealing with transfers of especially huge amounts of money needed strict adherence to the rules of procedure. Under Rule 12 (3) (a) and (f) of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007, negligence merits termination as provided herein;

"Rule 12(3)

The acts which may justify termination are-

(a) gross dishonesty;

(d) gross negligence.

This was so emphasized in the cases of **Saganga Mussa v Institute of Social Work,** Lab. Div, DSM Consolidated Lab. Rev. No. 370 of 2013.

In the instant matter I entertain no doubt that the allegations against the respondents amounted to a misconduct. Therefore, the applicant had valid reasons for termination.

Termination has to sides as shown before, on one side, proof of valid and fair reason for termination, and on other side, proof of procedural

fairness. They are like two sides of the same coin. One, has to follow another, if termination is to be considered fair. Here, I have to venture into whether the respondents' termination was procedurally fair.

Since termination in this matter based on misconduct, Rule 13 of the Code of Good Practice comes into play. Apart from rival submissions regarding this aspect, it is in record that there was a criminal case for the alleged misconduct going in court. There is evidence however, showing that disciplinary hearing was conducted when the case was still pending in court. This is not right, because termination as a matter law, should not be done when there are criminal charges pending in court in respect of the same misconduct as under section 37(5) of ELRA, and the case of **Bidco Oil and Soap Limited** (supra) is also an authority. It was the duty of the applicant to prove so. Since that was not done, it is held, that termination was not procedurally fair as the law requires.

Lastly what are the reliefs they are entitled, unlike Commission, I have found that the applicant had a valid reason to terminate the respondent.

However, the procedure which should not only be fair, but also be seen to be fair was not complied with. In the case of **Felician Rutwaza v**

World Vision Tanzania, Civil Appeal No. 213 of 2019, CAT (unreported). It was held that; -

> *"...Under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she was right in exercising her discretion ordering lesser compensation than that awarded by the CMA..."*

In the circumstances of this matter, the respondents are entitled to six months' salary for each respondent for unfair termination. The amount awarded by the Commission is set aside. Therefore, this application is partly allowed to the extent explained. I make no order as to the costs.

A.K.Rwizile

JUDGE

02.11.2021