IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED REVISION APPLICATION NO. 233 & 263 OF 2022

(Arising from an Award issued on 10/6/2022 by Hon. Wilbard G.M, Arbitrator, in Labour dispute No. CMA/DSM/ILA/777/12 at Ilala)

JACQUELINE MUSHI ..... APPLICANT/RESPONDENT

VERSUS

STANBIC BANK TANZANIA LIMITED ..... RESPONDENT/APPLICANT

JUDGMENT

Date of last Order: 22/09/2022
Date of Judgment: 25/10/2022

B. E. K. Mganga, J.

Brief facts of this consolidated application are that on 16th July 2008, Jacqueline Mushi hereinafter referred to as the employee, entered into unspecified period of employment with Stanbic Bank Tanzania Limited hereinafter referred to as the employer. The parties agreed that the said contract of employment will be with effect from 15th August 2008. In the said contract, the employee was employed as head of sales global market dealing with sale of foreign currency, treasury bills, bonds, etc. and was stationed at the Headquarters in Dar es Salaam. The relationship between

the employee and the employer turned into bitter when the employer alleged that between 15th November 2011 and 9th September 2012, the employee colluded with Maria Rajabu, one of the employer's staff stationed in Mwanza, by engaging with the customer's financial accountants of Williamson Diamond Limited to defraud the employer and caused the latter to suffer a pecuniary loss of TZS 1,095,845,000/=. Based on that allegation, on 9th November 2012, employer terminated employment of the employee.

Aggrieved with termination of her employment, on 29th November 2012, the employee filed Labour dispute No. CMA/DSM/ILA/777/12 before the Commission for Mediation and Arbitration henceforth CMA at Ilala claiming to be reinstated without loss of remuneration and payment of general damages. In the referral Form (CMA F1), the employee indicated that the dispute arose on 9th November 2012 and that she was terminated due to alleged misconduct and that charges were malicious because there was no proof of her involvement. On procedural fairness, she indicated that there was no proper hearing because termination was done while criminal charges were underway.

On 10th June 2022, Hon. Wilbard G.M, Arbitrator, having heard evidence of both sides, issued an award that termination of employment of the employee was substantively fair but procedurally unfair. The arbitrator found that the employee was denied evidence to be relied on by the employer in the Disciplinary hearing committee and that the employee was terminated while criminal charges were pending hence termination was procedurally unfair. Based on procedural unfairness, arbitrator awarded the employee to be paid TZS 153,000,000/= being 18 months' salary compensation.

The employee was aggrieved with the award of 18 months' salary compensation, as a result, she filed Revision Application No. 233 of 2022 seeking the court to revise the said award. In the affidavit in support of the Notice of Application, the employee raised one issue namely, that the Arbitrator arbitrarily/unjustly and unlawfully exercised her discretion in awarding the employee 18 months' salaries as compensation despite overwhelming evidence which establishes that:-

a) The Applicant was illegally charged, prosecuted, and terminated while there was a pending criminal charges against the applicant whose charges are substantially the same with the disciplinary proceedings.

b) The disciplinary hearing was conducted without affording the Applicant with fair hearing. She was not availed with requisite document to prepare for hearing.

c) The respondent illegally and maliciously reported the Applicant to Tanzania Bank Association and she was backlisted for 10 years. During all this period the Applicant was prevented to secure any employment with similar employer and or any other employer.

d) The evidence proves beyond all probabilities that the termination(sic) of the Applicant was maliciously done.

In resisting the application filed by the employee, the employer file the Notice of Opposition and the Counter Affidavit sworn by Eric Rwelamira, the head of legal department.

The employer was also not happy with the award, as a result, she filed Revision Application No. 263 of 2022 seeking the court to revise the said award. In the affidavit sworn by Eric Rwelamira in support of the Notice of Application, the employer raised three grounds namely :-

i) That the Arbitrator erred in law and fact for ordering eighteen (18) months' salaries in favour of the Respondent after finding that the Respondent's termination was unfairly only on procedural aspect.

ii) That the Arbitrator erred in law and in fact for holding that the Respondent's termination was procedurally unfair as she was terminated while she had already been charged with a criminal case.

iii) That the Arbitrator erred in law and in fact for ordering the Applicant to clear the Respondent's name with Tanzania bank Association regardless of

having there no established evidence that the Applicant reported the Respondent in the Banker's Association.

Likewise, in resisting the application, the employee filed both the Notice of Opposition and her Counter Affidavit.

Since both Revision Applications emanates from Labour dispute No. CMA/DSM/ILA/777/12 and award issued on 10th June 2022, on 12th September 2022, I issued a consolidation order that the two Applications shall be titled as consolidated Revision Application No. 233 of 2022 and 263 of 2022 and that the controlling record will be Revision Application No. 233 of 2022.

When the Consolidated Application was called on for hearing, the employee who is applicant in Revision No. 233 of 2022 and respondent in Revision application No.263 of 2022, was represented by Ms. Regina Kiumba, learned advocate, while the employer who is respondent in Revision Application No. 233 of 2022 and applicant in Revision Application No. 263. Of 2022 was represented by Mr. Arbogast Anthony, learned Advocate.

Arguing on behalf of the employee in Application No. 233 of 2022, Ms. Kiumba, learned advocate, submitted on the 1st ground that, the employee complains that the arbitrator unlawful exercised discretion in

awarding her 18 months salaries compensation despite the fact that she was terminated while there was a pending criminal charges against her. Counsel argued further that, the said criminal charges are substantially similar to the charges the employee stood in the disciplinary proceedings initiated by the employer. Ms. Kiumba submitted further that, on 06th November 2012, the employee was served with the notice to attend the disciplinary hearing while on 07th November 2012 she was charge in Criminal Case No. 517/2012. Counsel submitted that the employee was charged with the offences of stealing by servant and further that in the disciplinary hearing, she was charged for defrauding customers' account of TZS 1,095,845,000/=. Counsel for the employee submitted further that, the amount alleged to have been stolen as per the criminal charge sheet is similar to the amount allegedly the employee defrauded the employer as per the charge sheet in the disciplinary hearing. Counsel for the employee argued that there was double jeopardy and that the same is prohibited under Section 70 of the Interpretation of Laws Act [Cap. 1 R.E. 2019] and section 37(5) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019]. Counsel for the employee cited the case of ***Security Group Tanzania V. Athumani Abdallah***, Revision No. 260 of 2008 and ***Chai Bora Ltd V. Allan Telly Mtukula***, Revision No. 38 of 2017 to support her

submissions that a person cannot be charged twice for the same offence. She concluded that, since there was double jeopardy, the arbitrator was supposed to hold that there was no reason for termination.

On the 2nd ground that the employee was not afforded fair hearing, counsel for the employee submitted that the employee requested to be supplied with documents so that she can prepare her defence before the disciplinary hearing as per exhibit S8, but she was not supplied with. Ms. Kiumba, counsel for the employee went on that, the employee notified the disciplinary hearing committee that she was not ready for hearing because she was not served with the documents she requested as evidenced by exhibit S6, but the employer refused and proceeded with hearing. Ms. Kiumba submitted further that, the disciplinary hearing was conducted in violation of Rule 13(5) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. She cited the case of ***Grand Regency Hotel Limited V. Pazi Ally & Another***, Civil Application No. 368/01 of 2019, CAT(unreported), ***Hamisi Jonathan John Mayage V. Board of External Trade***, Civil Appeal No. 37 of 2009, CAT(unreported), ***Severo Mutegeki & Another V. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA)***, Civil Appeal No. 343 of 2019,

CAT(unreported), ***Mbeya – Rukwa Auto Parts and Transport Ltd V. Jestina George Mwakyoma*** [2003] TLR 25 to support her submissions that breach of the right to be heard renders proceedings a nullity. She concluded that the employee was not afforded right to be heard hence disciplinary hearing was a nullity.

On the 3rd ground that the employee was blacklisted from the Tanzania Bank Association, Ms. Kiumba, learned counsel for the employee submitted that because of being blacklisted, the employee has been unable to acquire employment for the past ten years. Ms. Kiumba submitted further that; arbitrator issued an order that the employer should remove the name of the employee from the list of the blacklisted persons. She went on that in June 2014, the employee was acquitted of the criminal charges and that no appeal was preferred. Ms. Kiumba, strongly submitted that due to the acquittal, the employer who reported the employee to the Tanzania banks Association, was duty bound to report back so that the employee can be removed from the blacklist. During submissions, Ms. Kiumba, learned counsel for the employee, conceded that it was the duty of the Republic to appeal and not the employer. She also conceded that, standard of proof in criminal cases is higher than in labour cases. When

asked by the court as to whether the arbitrator have jurisdiction to issue the order removing the employee from the blacklist, Ms. Kiumba, counsel for the employees, without citing any provision of the law or case law, submitted that arbitrator had jurisdiction. Counsel argued that the conduct of the employer has caused trauma to the employee warranting employee to be entitled to damages.

On the 4th ground, Ms. Kiumba submitted that evidence shows that termination of the employee was maliciously done by the employer because when the employee was issued with a notice of hearing (exhibit S3) she replied that the date fixed for hearing, that is to say; 08th November 2012, the employee was travelling to Mwanza for criminal investigation. Counsel submitted that the employee was summoned to appear before the Regional Crimes Officer (R.C.O) for Mwanza Region for investigation purposes as reflected in exhibit S4. Ms. Kiumba submitted further that, on the same date namely, 08th November 2012 employer wrote to R.C.O Mwanza to postpone investigation as evidenced by exhibit D10. Counsel went on that, on 06th November 2012, the employee was notified by the employer as per exhibit D9 that she should not travel to

Mwanza. Counsel concluded that the employer had the control of criminal proceedings initiated against the employee in Mwanza.

On procedural fairness, Ms. Kiumba submitted that, on 13th September 2012, employer commenced investigation and the same was completed on 15th November 2012 after termination of employment of the employee. She therefore concluded that, investigation report was never supplied to the employee contrary to the requirement of Rule 13(5) of GN. No. 42 of 2007(supra) that requires employer to serve the investigation report to the employee. Counsel for the employee concluded her submissions by praying that the employee be awarded salary for five years and be reinstated without loss of remuneration. She further prayed that the employee be paid damages and cited the case of ***Mahossein Salum v. Athmani Khalfan*** [1980] TLR 190 to support her submissions that the employee is entitled for damages.

Responding to submissions made on behalf of the employee in Revision Application No. 233 of 2022, Mr. Anthony, learned advocate for the employer, submitted that all four grounds raised by the employee are on procedural aspect surrounding employee's termination.

As to the 1st ground, counsel for the employer submitted that, the employee was terminated on 09 November 2012. Counsel submitted further that, the employee was charged after termination and there is no evidence suggesting that the employee was terminated after institution of criminal charges in Court. He relied on the letter to R.C.O to halt investigation (exhibit D10 and D9) to support his submissions that termination of the employee was before institution of criminal charges in court. Counsel for the employer went on that, the employee initially appeared in Mwanza as a witness before the employer had initiated disciplinary proceedings against her as evidenced by a letter written by the employee seeking adjournment of the disciplinary hearing (exhibit D8), in which, the employee stated that she appeared in Mwanza as a witness. Counsel for the employer strongly submitted that all appearances the employee made in Mwanza before termination was in the capacity of a witness and not an accused. Counsel for the employer cited the case of ***Peter Maghali V. Super Meals Limited***, Civil Appeal No. 279 of 2019 CAT (unreported) to support his argument that, an employer is not barred to take disciplinary action first followed by criminal charges and that what is forbidden is to file criminal charges and then terminate an employee. Counsel for the employer distinguished case laws cited on behalf of the

employee arguing that those cases are not applicable in the circumstances of this application.

On the 2nd ground, Mr. Anthony, counsel for the employer submitted that, the employee was afforded right to be heard. He argued that the employee appeared before the disciplinary hearing committee where she defended herself against the allegations she was facing. Counsel for the employer argued further that, there is no evidence proving that the employee requested to be supplied with documents to be relied upon by the employer in the disciplinary hearing and that, these are new issues that were not raised at CMA hence should be disregard. Counsel for the employer submitted further that, the letter dated 14th November 2012 (exhibit S.7) was written after termination of the employee on 09th November 2012. In his submissions, Mr. Anthony conceded that the investigation report was not there during disciplinary hearing hence it could not be served to the employee.

Mr. Anthony submitted that the 2nd ground of revision filed by the employee is also an issue of procedure. He submitted that, reinstatement cannot be ordered when there is only procedural unfairness and cited Rule 32(2)(d) of the Labour Institutions (Mediation and Arbitrations Guidelines)

Rules, GN. No. 67 of 2007 to that effect. He further cited the case of ***Felician Rutwaza V. World Vision Tanzania***, Civil Appeal No. 213 of 2019, CAT (unreported) and ***Veneranda Maro & Another V. Arusha International Conference Centre***, Civil Appeal No. 322 of 2020, CAT (unreported) to cement on his submission.

When arguing the 2nd ground, Mr. Anthony conceded that it is true that on 09th November 2022 the employee prayed to be supplied with documents (exhibit S8). He submitted further that, in both exhibit S.7 and S.8 the employee was not asking to be supplied with documents. Counsel for the employer maintained that exhibit S.7 was written after termination of the employee and that exhibit S8 is dated 09th November 2012 the very date of disciplinary hearing. Counsel clarified that in S. 8, the employee was requesting further and better particulars of the charge relating to CV but that charge was dropped. He went on that; the employee was requesting clarification of the relationship between the 1st and 2nd charge and representation by her own choice. Counsel argued that there is no evidence proving that exhibit S.8 was served to the employer. Mr. Anthony submitted further that in ***Maghali's case*** (supra), the Court of Appeal found that disciplinary proceedings was nullity but found that there was

valid reason for termination and ordered the employee to be paid 12 months compensation. He argued that the Court did not order reinstatement. Mr. Anthony therefore prayed the court not to order reinstatement.

On the 3rd ground, Mr. Anthony, submitted that there is no evidence that was adduced showing that the employee was blacklisted hence the claim was not substantiated. Counsel for the employer argued that it was just the employees' word of mouth that she was blacklisted in absence of evidence from the Tanzania Bank Association or letter tendered to that effect. Counsel concluded that the arbitrator acted on mere conjecture without being satisfied that the employee was blacklisted.

On the 4th ground, that termination was maliciously done, counsel for the employer submitted that, all what was submitted on behalf of the employee is on procedural issues and not on substantive fairness. He maintained that the employee requested disciplinary hearing to be adjourned so that she can go in Mwanza as a witness (exhibit S4) but the employer managed to secure adjournment of her attendance at Mwanza to pave way for disciplinary proceedings, as a result, she remained in Dar es Salaam until when she was terminated and travelled to Mwanza thereafter.

Mr. Anthony argued further that the prayer for reinstatement and five years salaries compensation is unwarranted in the circumstances of the application at hand. Counsel argued that, even if it can be assumed that the employee was terminated while criminal proceedings pending, which is not the case, that is a procedural issue, that does not warrant reinstatement. He therefore concluded by submitting that the application by the employee be dismissed for want of merit.

In rejoinder, Ms. Kiumba, learned counsel for the employee submitted that the employee is challenging both substantive and procedural fairness of termination and not only procedural fairness and reiterated her submissions that there was double jeopardy. Counsel submitted further that, on 13th September 2012 as per exhibit J5 the matter was reported at Police and argued that, once a matter is reported at Police, the employer is barred to take any disciplinary action against an employee. Counsel for the employee cited the provisions of Section 37(5) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019], ***Chai Bora case*** (supra) and ***Peter Maghali*** (supra). Counsel for the employee maintained that it is not true that the employee was terminated prior institution of criminal charges in court. She maintained that exhibit S.4 is

clear that the employee was attending as a witness and that criminal proceedings has commenced. Counsel strongly argued that reporting of the employee at Police initiated criminal proceedings.

Counsel for the employee maintained that the employee was not fairly heard because she was not ready for hearing and was not supplied with documents she requested prior commencement of disciplinary hearing (exhibit S.6 and S.8). Ms. Kiumba submitted further that, ***Rutwaza's case*** (supra) is distinguishable because in the application at hand, termination is both substantively and procedurally unfair. Counsel for the employee argued further that, ***Veneranda's case*** (supra) is also distinguishable because in that case, the employee had a fixed term contract unlike to the application at hand and distinguished ***Maghali's case*** (supra) because in the application at hand there was no reason to terminate the employee.

On submissions relating to blacklisting of the employee, Ms. Kiumba reiterated her submissions in chief that the employee was blacklisted and added that there is no law providing that oral evidence must be corroborated by documentary evidence. She reiterated her submissions that termination was based on malice and that there was no reason for termination and that procedures thereof were not followed.

Arguing on behalf of the employer in Revision Application No. 263 of 2022, Mr. Anthony, learned counsel submitting on the 1st ground namely, that the arbitrator erred in law to award the employee to be paid 18 months salaries after she had found that termination was only procedurally unfair, submitted that, arbitrator found that there was valid reason for termination but that the procedure was faulted yet, she awarded the employee to be paid 18 months salaries as compensation. Counsel submitted that, a phone call conversation (exhibit D2) was tendered relating to a scheme intended to defraud both the bank and the customer hence valid reason for termination. Counsel went on that, the employee was terminated on ground that she colluded to defraud the employer and the arbitrator found that termination was substantively fair, hence the arbitrator was supposed to award the employee lesser penalty not exceeding 12 months salaries. Counsel cited ***Veneranda Maro's case*** (supra) to support his submissions.

On the 2nd ground, Mr. Anthony, submitted that, the employee was terminated prior being charged with a criminal case. Counsel briefly submitted that; the only procedural issue is that there was no investigation report at the time of termination of employment of the employee. He

concluded that, the said procedurally unfairness cannot warrant award of 18 months salaries to the employee.

Submitting on the 3rd ground, Mr. Anthony, submitted that the arbitrator erred to order the employer to clear the name of the employee to the Tanzania Bank Association as there was no evidence.

Replying on submissions made on behalf of the employer in Revision Application No. 263 of 2022, Ms. Kiumba, learned advocate for the employee submitted in relation to the 1st ground that termination was both substantive and procedural unfair. In her submissions, counsel for the employee conceded that there was phone call conversation but was quick to submit that the court should consider all exhibits in order to conclude whether there was a reason for termination.

Responding to the 2nd ground raised by the employer, Ms. Kiumba maintained that the employee was terminated after being charged hence double jeopardy, hence procedural unfair. She argued that, in terms of Section 40(1)(c) of Cap. 366 R.E. 2019 (supra), when termination is unfair procedurally, the Court is not allowed to award less than 12 months compensation.

Ms. Kiumba, responding to the 3rd ground raised by the employer submitted that, it is the employer who reported the employee to the Tanzania Bank Association and that there is no other person who reported the employee other than the employer, which is why, the employer was ordered to remove the name of the employee from the list of the blacklisted persons. Counsel for the employee prayed Revision Application No. 263 of 2022 be dismissed for want of merit.

In rejoinder, Mr. Anthony for the employer reiterated his submissions in chief that arbitrator found that termination of the employee was fair substantively but unfair procedurally and that 18 months salaries compensation was unwarranted. He submitted further that in **Rutwaza's case** (supra), the Court of Appeal discussed the provisions of Section 40(1)(c) of Cap. 366 R.E. 2019 (supra) and held that the Court can award less than 12 months compensation if termination is only procedurally unfair. He maintained that the employee was terminated before criminal charges or proceedings were filed in Court. He reiterated further that, allegations relating to blacklisting the employee was not substantiated and concluded that Revision Application No. 263 of 2022 be allowed.

I have carefully examined the CMA record and considered submissions of the parties in this consolidation application and find that it is undisputed that on 9th November 2012, employer terminated employment of the employee on ground that the employee committed gross misconduct as evidenced by termination letter (exh. S.9). As pointed hereinabove, the arbitrator found that employer had valid reason for termination but did not follow procedures hence procedural unfair termination. It was submitted by Mr. Anthony learned counsel for the employer that all grounds of revision raised by the employee in Revision Application No. 233 of 2022 are on procedural fairness, but Ms. Kiumba, learned counsel for the employee was of the view that it is on both validity of reason and fairness of procedure. I have examined the grounds raised by the employee in Revision Application No. 233 of 2022 and find that in the 4th ground, the employee is complaining that termination of her employment was done maliciously. In view, the employee is complaining that there was no valid reason for termination of her employment. That being the case, I will therefore consider both valid of reason and fairness of procedure in this consolidated Revision and the reliefs the parties are entitled to.

In disposing this consolidation application, the main issue is whether; the employer had valid reason for termination of employment of the

employee. I have examined evidence of Wilmot Ishengoma (DW1) and find that in his evidence testified that the employee colluded with one Maria Rajabu also an employee of the employer stationed in Mwanza and another employee of Williamson Diamond to defraud both the employer and the employer's client namely, Williamson Diamond. It was evidence of DW1 that, due to acts of the employee, the employer paid USD 522,000 to Williamson Diamond as amount that the latter was underpaid due to fraudulent scheme of the employee and others. In his evidence, DW1 tendered a CD as exhibit S.2 containing communications between the employee and the said Maria Rajabu, explaining how the employer will be defrauded. The CMA record shows that exhibit S. 2 was played at CMA during hearing and the arbitrator had an advantage to listen to its contents and in fact, arbitrator recorded some of the words in conversation between the employee and the said Maria Rajabu. Not only DW1 who testified on reasons for termination of employment of the employee but also, Clemence Simbachawene (DW2) and Beatrice Monyo (DW3). Evidence of these witnesses proves that there was valid reason for termination of employment of the employee. In her evidence, Jacqueline Mushi (PW1) testified on how she came to know that the employer was being defrauded and admitted that the employer told her to communicate with Maria Rajabu

who was at Mwanza branch. In fact, considering evidence of the employee and that of the employer in totality, I have no reservation to hold that the employer had valid reason to terminate the employee. Evidence of collusion between the employee and others was dully adduced by witnesses of the employer and is corroborated by evidence of the employee. In her evidence, the Jacqueline Mushi (PW1) i.e., the employee tendered "Forensic investigation conducted at Mwanza Branch & H/O-Global Markets" (exhibit J5). I have read the said report (exh. J5) and find that it reads in part:

"A review of forex transactions that were executed through the customer's accounts over the period November 2011 to September 2012 was carried out and the amount lost was determined to be TZS 1,095,845,000. Investigation revealed that staff members at Mwanza Branch colluded with some of the customer's officers to perpetuate the fraud through the crediting of less TZS into the customer's account making the effective rate applied in the conversion of USD to TZS to be lower than what was agreed with Global Markets. They would then proceed to withdraw the excess amount arising from the exchange disparity…

Jacqueline Mushi (Jacqueline) Head of Sales and Maria Rajabu (Maria) Relationship Manager were identified as the masterminds of the fraud. Jacqueline had initially pretended to be a whistleblower but a controlled recorded phone conversation between the two of them revealed that she was involved in the fraud. The phone call was recorded in the presence of Head of Operations, Head of Internal Audit and Director PBB. Investigations established that the fraud was indeed executed as per their discussions.

2.1 Detection

The Fraud was discovered on 10 September 2012 when WDL, holders of USD account number 0240012521601 and TZS 0140012521601 queried the rate that had been applied to transfer funds between their Dollar/Shilling accounts. WDL suspected that the rates used differed from the rates agreed with the Global Markets.

2.2 modus operandi perpetrating the fraud

Investigations revealed that the customers had obtained a special rate from Global Market (GM) at Head Office for foreign exchange transfers between their USD and TZS account, the equivalent amount converted to TZS was not fully credited into customers account. The rates that were agreed with the customer were obtained by the Financial Manager of WDL who would call Global Markets (GM). He would then be provided with a special rate to carry out transfers from their USD to TZS account. The GM trade personnel would then call the Relationship Manager Private Banking at Mwanza Branch and relay to her the agreed rate for the transaction.

The actual fraud was perpetrated at Mwanza Branch when the funds from WDL's USD account would be debited with the amount that WDL intended to exchange into TZS. The debit would be processed using foreign exchange codes and the TZS amount obtained would be credited into the Mwanza Branch's general cash account. Following the conversion of the USD amount to TZS, the customer's TZS account would then be credited with less TZS amount than what was initially credited into the Branch's general cash account thereby making the effective rate applied to be lower than the rate agreed with the customer. At this stage, there would be an excess amount in the general cash account. The excess cash would then be physically taken from the teller's till through the posting of a fictitious withdrawal entry (debiting the teller till) and the credit would be passed onto the general cash account. The debiting and crediting of the teller's till and general cash account would result in both accounts balancing. In processing foreign exchange transactions in the ordinary course of business, there are no entries that are passed through the general cash account. The only account through which transactions should be passed is the Position's account. The TZS credit would directly go to a customer's account without passing through the general cash account. From the

manner in which the disputed transactions were handled, it is clear that staff intentionally processed the transactions through the general cash account to avail the excess cash that they proceeded to misappropriate…

2.4.1 Jacqueline Mushi and Maria Rajabu

After WDL raised concerns as to the rates that had been utilised in processing their transactions, Jacqueline Mushi (Jacqueline), Head of Global Market Sales approached the Head of Operations purporting to be a whistleblower and she indicated that Maria Rajabu (Maria), Relationship Manager had approached her to discuss how to silence WDL's Finance Director who had raised the query. Jacqueline was then asked to call Maria through her cell phone and the conversation which was recorded was held in the presence of Mary Mabiti, Head of Internal Audit, Douglas Kamwendo, Director PBB and Lulu Shikonyi, Head of Operations. During the call, it transpired that Jacqueline was involved in the fraud since Maria, with whom she was holding the conversation was unaware that it was being recorded and that there were other people in the room with Jacqueline. Jacqueline was also unable to control responses that Maria gave in respect to the questions that were posed. Jacqueline and Maria are recorded discussing the modalities of committing the fraud. Jacqueline raised the question as to how Omary (presumably Omary Mwin'dadi), the Financial Manager at WDL would be given his cash and Maria responded by stating that Omar would proceed to Mwanza Branch where the cash would be handed over to him. Maria stated that this would not raise any suspicion since Omar holds an account at the Branch and it would appear as though he was making a withdrawal from his account. Maria also asked Jacqueline whether they should involve Joshua (presumably Joshua Kyelekule), Mwanza Branch Manager and Jacqueline responded by stating that they should not bring more people into the plan. Jacqueline then proceeded to ask Maria ho would process the transaction and Maria informed her that she would deal with the processing of the transaction and that Jacqueline should leave it to her. Maria further stated that she would use a teller's ID to process the transaction and Jacqueline probed further by querying how she would do this as the teller was on leave. In response, Maria stated that she would use another teller's user ID. Maria further stated that all she needed was a go ahead from Jacqueline to proceed

and Jacky asserted that new people should not be introduced into the plan. Jacqueline is also heard to be questioning Maria as to the issue of vouchers for the transactions and Maria assured her that there would be no vouchers whatsoever and that the only trace that would be left would be the user ID used in passing the transactions in the system. The conversation ended with Jacky stating that she would proceed to talk to Omary on the way forward and get back to Maria. Following the revelation that Maria would use another staff member's user ID to process the fraudulent transactions, the investigation team performed a review of the transactions that were posted on 7 September 2012 and we noted that the WDL USD account was debited with an equivalent of TZS 459,000,000 and their TZS account was only credited with TZS 393,800,000 resulting in a difference of TZS 62,200,000. A review of the transaction details revealed that the transactions were posted using Mwanza Branch teller, Rhobi Simangwi's (Rhobi), user ID and it was approved using Mwanza Branch Head Service Support, Elizabeth Ezekiel's (Elizabeth) user ID. At the time that the transactions were posted, both Elizabeth and Rhobi were on leave. A review of the IP address from which the posting and approval of the transaction was done was carried out and it was determined that the transactions were posted and approved from PC bearing IP address number 10.231.130.65 which was Maria's Ip address. Maria was interviewed in respect to the case and she refused to offer any explanations. Jacqueline was also interviewed and she stated that:-

> *She communicated all the agreed rates daily to Maria, Omary or Clement of WDL during the period/dates under investigation. She suggested that the fraud in question continued unnoticed for a long period of time due to either WDL's poor accounting and /or collusion.*

3.3 Jaqueline Mushi

Jacqueline's recorded telephone conversation with Maria identified her as an accomplice to the fraud and not whistleblower. Investigation revealed that the fraud was committed in the manner as per the recorded discussions between them".

It is my findings therefore that, employer had a valid reason for terminating employment of the employee contrary to what was submitted by Ms. Kiumba learned counsel for the employee that termination of the employee was actuated with malice. In fact, exhibit J5 that was tendered by the employee shows at pages 13 to 15, the date of incidence, the amount in USD for exchange, amount in TZS the customer was supposed to get, amount credited in customer's account and the difference amount that was not paid. For example, exhibit J5 shows that on 24th August 2012, amount for exchange in USD was 300,000 and that the customer was supposed to get TZS 457,500,000/= but was only paid TZS 372,500,000/= and that TZS 85,000,000/= was not paid. In total the report shows that the customer namely Williamson Diamond, was supposed to be paid TZS 13,830,953,000/= but she was paid TZS 12,735,108,000/= hence was not paid TZS 1,095,845,000/= for the whole period in question. I therefore confirm the holding of the arbitrator that termination of the employee was substantively fair. It is my view as pointed hereinabove that considering in totality evidence of the employer and that of the employee, the only conclusion available is that the employer had valid reason for termination. It is my further opinion that exhibit J5 quoted hereinabove that was tendered by the employee shade light what actually was done by the

employee and others who are not part to this consolidated application in defrauding the employer. In my view, exhibit J5 corroborated evidence of the employer on validity of reason for termination.

It was submitted by Ms. Kiumba, learned counsel for the employee that on 06th November 2012 the employee was served with the notice to attend the disciplinary hearing while on 07th November 2012 she was charge in Criminal Case No. 517/2012 and was terminated on 9th November 2012 hence double jeopardy. It was submitted by Ms. Kiumba that the provisions of Section 70 of the Interpretation of Laws Act[Cap. 1 R.E. 2019] and section 37(5) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] prohibit double jeopardy and that there was double jeopardy. On the other hand, Mr. Anthony learned counsel for the employer was of the view that the employee was terminated prior institution of criminal charges in court and that there was no double jeopardy. This issue cannot detain me because "Re: request for an adjournment to appear before the disciplinary Committee letter dated 7th November 2012" (exhibit S4) that was authored by the employee shows clearly that employee was terminated before being charged with a criminal case in court. From exhibit S4, it is clear that the employee informed the employer that she will be travelling to Mwanza on 8th November 2012 as

she was required by police for the ongoing investigation. She asked the employer to contact police at Mwanza central station for confirmation. Again, a letter titled "Re: suspension from duty and appearance before the disciplinary committee" dated 9th November 2012 authored by the employee (exhibit S.8), shows that the employee indicated that on 31st August 2012, she went in Mwanza with two other employees who alleged that they were assisting her and that while at Police Station in Mwanza she was arrested on the same date and detained. In exhibit S8, the employee stated that she was bailed out at police on the second day and ordered to report on 9th November 2012. Exhibit S8 reads in part:-

> *When I got to Mwanza police Station, on 31 October 2012, instead of being a witness, after having separated from my collogues, I was interrogated as a suspect and had to spend a night in a police station as an accused person…I had to spend a night in a police cell and struggled to bail myself out.. in Mwanza I* ***was given a police bail*** *and required to report on Friday 9 November 2012. When I informed the bank about my inability to attend the Disciplinary Enquiry, which had been convened on 8 November 2012, because I had to travel to Mwanza, the bank insisted that I attend on Friday November 2012 at 11.00 am while knowing that I am supposed to be in Mwanza…"*

The fact that the employee was granted police bail and required to attend at police on 9th November 2012, is a proof that at that time, no charges against her was filed in court otherwise, she could have been forced to secure bail from court. There is no dispute that employee did not

go to Mwanza until when the disciplinary hearing was conducted and found guilty and her employment terminated on 9th November 2012. I therefore safely conclude that employment of the employee was terminated prior institution of criminal proceedings in court. Since at the time of termination there was no criminal proceedings instituted in court, the provisions of Section 70 of the Interpretation of Laws Act[Cap. 1 R.E. 2019] and section 37(5) of the Employment and Labour Relations Act [Cap. 366 RE. 2019] cannot apply. Sections 37(5) of Cap. 366 R.E. 2019 (supra) does not cover reporting of an employee at police or situations where police officers are conducting investigation. It applies only when an employee is charged with a criminal offence that is substantially the same with the alleged employment misconducts as it was held by the Court of Appeal in the case of ***Peter Maghali vs Super Meals Limited,*** Civil Appeal No. 279 of 2019 [2022] TZCA 217. In fact, the section does not state that once a person is reported at police to have committed an offence which is alleged as an employment misconduct, should not be terminated or disciplinary actions should not be taken until conclusion of investigation and or proceedings in court. From where I am standing, charging of a person with a criminal offence is different from reporting a person who is alleged to have committed a criminal offence. The legislature did not intend to cover the

latter situation, which is why, the said section 37(5) uses the phrase "charged with a criminal offence". It is my considered opinion therefore that, submissions by Ms. Kiumba that once a matter is reported at Police, the employer, is barred to take any disciplinary action against an employee is not correct. In **peter Maghali's case** (Supra), the Court of Appeal after quoting section 37(5) of Cap. 366 R.E. 2019 (supra) it held *inter-alia*:-

> *"In its natural and ordinary meaning, the above provision forbids an employer from taking any disciplinary action, be it a penalty, termination or dismissal, against an employee who has been charged with a criminal offence that is substantially the same as the misconduct allegedly committed…the above provision does not bar an employer from taking a disciplinary action first, followed by a criminal action where an employee's conduct amounts to a disciplinary misconduct as well as a criminal offence; what it is forbidden is the vice versa. In a similar vein, section 37(5) does not forbid an employer from taking a disciplinary action against an employee for a transgression substantially different from the criminal offence facing the employee."*

It was submitted by counsel for the employee that since there was double jeopardy, the arbitrator was supposed to hold that there was no reason for termination. With due respect, to counsel for the employee. That is not the correct position. In my view, double jeopardy goes only on procedural fairness and not validity of reason because a misconduct committed by an employee cannot be said was not committed simply because the employer

did not follow the procedure for termination. In my view, validity of reasons for termination does depend on procedural fairness because these are two different criteria for determining termination fairness of the employee. Normally, if proved that there was no valid reason for termination, then, it may be unnecessary to look for fairness of procedure. This is because, even if procedures were followed, in absence of valid reason for termination, it will remain to be unfair termination. But, if proved that there was valid reason for termination, then, it is necessary to go to the second stage, namely, whether procedure was followed. If proved that procedures for termination were also complied with, then, termination is fair both substantively and procedurally. But, if proved that procedures were not adhered to, then, termination is substantively fair but procedurally unfair. In the application at hand, the arbitrator found that the employer had valid reason for termination hence termination was substantively fair and that procedures were flawed which is why, she held that termination was procedurally unfair. Double jeopardy prohibited under the cited provisions by counsel for the employee are on procedural fairness and not on validity of reasons. I therefore dismiss that ground.

It was submitted by Ms. Kiumba, learned counsel for the employee that the employee was not afforded fair hearing because she requested to

be supplied with documents so that she can prepare her defence before the disciplinary hearing, but she was not supplied and that investigation report was issued on 15th November while the employee was terminated on 9th November 2012 prior conclusion of investigation. Mr Anthony learned counsel for the employer submitted that the employee wrote exhibit S.7 after termination. I have examined exhibit S. 7 titled Re: Disciplinary hearing 9th November 2012" and find that it is dated 14th November 2012 while the disciplinary hearing was conducted on 9th November 2012. Therefore, this exhibit was written by the employee after termination of her employment. I have however, found that the employee was not ready for hearing on 9th November 2012 because there is endorsement on the Disciplinary Discussion Form (exh. S 6) showing that she was not ready for hearing, but disciplinary hearing proceeded on the same day. Exhibit S.6 was tendered by the employer with those endorsements. I therefore find that, there is substance in complaint by the employee in this aspect.

It was further submitted by Kiumba, that the employee was not served with investigation report hence termination was unfair procedurally. Mr. Anthony conceded, correctly in my view, that, at the time of termination, the investigation report was not ready hence impracticable to be served to the employee. I agree with submissions by Ms. Kiumba

counsel for the employee that termination of the employment of the employee was unfair. I am of the strong view that termination was unfair procedurally and not substantively contrary to what counsel for the employee submitted. My conclusion is supported by decision of the Court of Appeal in the case of ***Severo Mutegeki & Another V. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA),*** Civil Appeal No. 343 of 2019, CAT(unreported) and of ***Peter Maghali vs Super Meals Limited,*** Civil Appeal No. 279 of 2019 [2022] TZCA 217.

Having held that termination was substantively fair but unfairly procedurally, the question to be asked is what relief(s) the parties are entitled to.

It was submitted by Kiumba, learned advocate for the employee that this court should revise CMA award on ground that in awarding the employee 18 months' salary compensation, the arbitrator did not properly exercise her discretionary powers. Counsel for the employee prayed that the employee be reinstated without loss of remuneration and in addition, be paid five years salaries as compensation. On his side, Mr. Anthony, counsel for the employer submitted that since employer had valid reason for termination, and that termination was only unfair procedurally, the employee is entitled to be awarded less than twelve months' salaries. In

her submissions, Ms. Kiumba learned counsel for the employee did not explain or justify as to why the employee deserve to be paid salaries for five years. From where I am standing, I don't see justification for that prayer because there is no evidence on record justifying that prayer or payment. It has been held several times by this court and the Court of Appeal that when termination is only unfair procedurally, the court and CMA, can award the employee to be compensated less than twelve years. Case laws to that position are ***Felician Rutwaza vs World Vision Tanzania,*** Civil Appeal No. 213 of 2019 [2021] TZCA 2, ***Veneranda Maro & Another vs Arusha International Conference Center,*** Civil Appeal No. 322 of 2020 [2022] TZCA 37 cited by counsel for the employer.

I have read the CMA award and find as explained hereinabove that, there was no justification offered by the arbitrator in awarding the employee to be compensated 18 months' salaries. It is my view, that based on the circumstances of the application at hand, the employee is entitled to paid four(4) months' salaries as compensation for unfair termination. According to evidence of the employee, her last monthly salary was TZS 8,500,000/=. She is therefore entitled to be paid TZS 34,000,000/=.

It was complained by the employee that the employer maliciously reported to the Tanzania Banks Association, as a result, she was

blacklisted. It was therefore submitted on behalf of the employee that the employer had a duty to ensure that the employee is removed from the list as it was ordered by the arbitrator. When asked by the court whether arbitrator has jurisdiction to issue such an order, counsel for the employee, without citing any law replied that arbitrator had that jurisdiction. On his side, counsel for the employer submitted that, there is not proof that the employer is the one who reported the employee to the Tanzania Banks Association leading to blacklist of the employee. In rejoinder, counsel for the employee maintained that the report was made by the employer.

I have examined evidence of the employee (PW1) and find that she is recorded while testifying in chief that:-

> *"…Naomba Tume inirudishe ktk ajira,4 9yrs, nliripotiwa ktk Bank Association ksbb ya kufukuzwa kazi kwa tuhuma za wizi. Purpose ya kum report Bank Association ni kumripoti uhalifu consequences ni huwezi kuajiriwa…"*

The quoted paragraph is the only evidence relating to reporting to the Tanzania Banks Association. Poorly recorded as it is, that evidence does not disclose the person who reported the employee to the Tanzania Banks Association. Even if it can be assumed that the report was done by the employer, yet, it cannot be said that it was done maliciously because fraud was committed by the employee and others who are not part to this

application. As I have held hereinabove, employer had valid reason for termination. Again, if assumed that the report was done by the employer, then, the purpose was to report incidence of theft or an offence committed and ensure that banking industry in the country may not lose credibility from its customers. I find that the complaint by the employee is unjustifiable. More so, arbitrator had no power to issue the order directing the employer to remove the name of the employee from the list of the persons blacklisted. I am of that position because in the Referral Form (CMA F1), employee did not indicate that she was also praying and order to be issued to the employer requiring the latter to remove her name(employee) from the list of blacklisted persons. In the said CMA F1, the employee indicated that she was claiming to be reinstated and be paid damages only. Therefore, in ordering the employer to remove the name of the employee from the list of blacklisted persons by the Tanzania Banks Association, arbitrator acted on matters that was not pleaded to by the employee. It is a cardinal principle that parties are bound by their own pleadings and they are not allowed to depart therefrom as it was held in the case of ***George Shambwe v. AG and Another*** [1996] TLR 334, ***The Registered Trustees of Islamic Propagation Centre (Ipc) v. The Registered Trustees of Thaaqib Islamic Centre (Tic)***, Civil Appeal

No. 2 of 2020 ,CAT (unreported). and in ***Astepro Investment Co. Ltd v. Jawinga Company Limited***, *Civil Appeal No. 8 of 2015,* CAT (unreported). In the ***IPC's case***, (supra), the Court of Appeal held that: -

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings .... For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties.

In labour disputes filed at CMA, pleadings are contained in CMA F1. Therefore, parties are bound by what was pleaded in CMA F1. It is my view therefore that, since in CMA F1 the employee did not plead that one of the reliefs is removal of her name in the list of persons blacklisted by the Tanzania Banks Association, it was an error on part of the arbitrator to issue such an order.

For the foregoing, I dismiss Revision Application No. 233 of 2022 for being meritless. On the other hand, I allow Revision Application No. 263 of 2022 and revise the CMA award to the extent explained hereinabove.

Dated in Dar es Salaam on this 25th October 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 25th October 2022 in chambers in the presence of Ms. Regina Kiumba, Advocate for the employee, applicant in Revision Application No. 233 of 2022 and respondent in Revision Application No. 263 of 2022, and Mr. Arbogast Anthony , Advocate for the employer, respondent in Revision Application No. 233 of 2022 and applicant in Revision Application No. 263 of 2022.

B. E. K. Mganga
JUDGE