IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 06 OF 2022

VITALIS MPENDAZOE .... APPLICANT

VERSUS

AMANA BANK LTD .... RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Kinondoni)

(Mbena : Arbitrator)

Dated 26th November, 2021

in

REF: CMA/DSM/KIN/114/21/57/21

JUDGEMENT

27th September & 26th October, 2022

Rwizile, J

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/114/21/57/21. This Court, is called upon to call for records, examine the proceedings and revise the award.

Briefly, it has been stated that the applicant was employed by the respondent as a quality service manager from 01st March, 2017. On 21st September, 2020, he was promoted to a business manager-deposits and

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transactional banking. On 29th January, 2021, he was terminated due to gross misconduct.

The applicant felt, he was terminated unfairly. He then filed a labour dispute at CMA, claiming for compensation of TZS 104,952,283.6, as terminal benefits for unfair termination. After a hearing, the award was not in his favour. He filed this application in protest.

The application is supported by the affidavit that raised the following grounds for revision: -

a. *The trial arbitrator erred in law and fact for not finding that termination was substantively unfair due to absence of valid reason.*
b. *The trial arbitrator erred in law and fact to disregard the fact that employers' policies were not known to the applicant until the date of the alleged charges were served and applied retrospectively.*
c. *The trail arbitrator erred in law and fact to disregard the fact that alleged charges to the applicant did not even exist in the forced human resources policy.*
d. *The trial arbitrator erred in law and fact to disregard the disciplinary hearing was unfair in terms of right to be heard on all evidences that form part on the hearing proceedings.*

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e. *The trial arbitrator erred in law and fact by not considering the applicant's evidence and his exhibits that were submitted at the arbitration hearing.*

f. *The trial arbitrator erred in law and fact by not considering that the respondent failed to accord the applicant right to have legal consultancy.*

g. *The trial arbitrator erred in law and fact by holding that termination was procedurally fair.*

The hearing proceeded orally. Both parties were represented. Mr. George Palangyo was for the applicant and Miss Angel Mwesiga was for the respondent. Mr. Palangyo combined grounds (a -d) on reasons for termination and argued them together, while grounds (e - g) on procedure for termination were as well argued together.

He submitted that the Human Resource policies and Bank Code of Good Practice which were allegedly infringed were not known to the applicant. He said, they were not given to him which is contrary to rule 11 of G.N. No. 42 of 2007. He continued to argue that the same were not approved by the board as per exhibit D6 and that there is no proof that they were approved by BOT.

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He argued further that, the two documents were given to the applicant after the alleged misconduct contrary to section 7 of Employment and Labour Relations Act [CAP. 366 R.E. 2019]. It was his view, that clause 5.2.2 para 'R' of Amana Bank Resource Policy does not exist. The loan, he went on arguing, which is the source of misconduct, was granted to the applicant by default as it was cancelled before it was issued to him. There was evidence, he argued, from Dw1 stating the loan was issued by mistake. This piece of evidence, he said, was not accepted on reason that it was brought by the applicant himself. In his opinion, there was no reason for termination.

Mr. Palangyo submitted on grounds (e - g) that, exhibit D5 was given to the applicant on 19th November, 2020 and was supposed to reply in 3 working days that is on 24th November, 2020.

He went on stating that on 19th November, 2020, the applicant asked to be supplied with Bank Code of Good Practice, Staff Disciplinary Code and exhibits that substantiate the allegation. The applicant was given a link but could not access the same, he stated.

It was insisted that the applicant physically went to collect the documents, but was warned not to share with anyone, who is not a staff member until permitted by authorities as per exhibit D6. He continued to stated that,

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the applicant applied for 5 days extension to answer the letter and a legal advice as per exhibit D7 collectively.

It was stated as well that on 13th January, 2021, a notice for a disciplinary hearing was issued. He was notified, it would be held on 18th January, 2021 (exhibit D8). He submitted that, it was conducted as per exhibit D11 and was to provide extra information (Bank statement and proof of re-payment of the loan). He stated that they were issued on 21st January, 2021 and was called on 29th January, 2021. He further commented that, instead of further hearing, the matter was adjourned upon a finding of guilty and then terminated (exhibit D12).

Mr. Palangyo submitted that the applicant was not given the right to properly defend his case and right to be heard was infringed. He stated that termination was therefore unfair. He prayed for the reliefs as in CMAF1 based on his salary as shown in exhibit D12.

In reply Miss Angel, on reasons for termination stated that, they are, as in exhibit D5 valid. She stated that failure to disclose proper information, failure to pay loan and failure to protect Bank image are misconducts as exhibit D1 (letter of employment) stated about the policy and the manual. She continued to stated that as exhibit D6 (email exchange) the same was known to him and has no justification.

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She submitted that exhibit D3 shows, the applicant had not cancelled his loan application which was signed on 10th September, 2020. The Bank statement, he added was on 12th September, 2020. In her view, the loan was not cancelled by the applicant as he failed to prove so. She stated further that, the letter cancelling it, was not brought by the render and was not verified. Based on that reason, termination was valid as the applicant borrowed from outside the Bank and did not pay the loan.

On the issue of procedure for termination, she submitted that as exhibit D5 shows, the letter was issued on allegations he did not reply, but as exhibit D6 shows, he wrote emails. In her view, the manual and policy were not new documents. She stated that, after an elapse of 50 days without any reply from the applicant, the respondent took a step to write a reminder letter. She argued, the disciplinary hearing was conducted upon giving the applicant an ample time of more than 48 hours as per exhibit D11.

She stated further that the applicant was asked to provide proof of cancellation and, if the payment was made. He only provided the bank statement. She stated that upon conviction, the applicant did not mitigate. The procedure, she held the view, was followed. To support her point, she cited the case of East **African Cables v Spencon Services**,

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Miscellaneous Application No. 61 of 2016 and then prayed, the application be dismissed.

In a rejoinder, Mr. Palangyo submitted that exhibit D1 showed dress code and code of conduct and that other documents were not proved to have been given to him before. In exhibit D6, he stated, the documents were not regularly shared with employees, they could have proved by evidence. He said, exhibit D3 proved the applicant got the money. Exhibit D11 shows the money was 480,000/= and not 1,000,000/= which he applied for.

After perusal of both submissions, I find it important to determine the following issues: -

i. *Whether there were reasons for terminating the employment contract of the applicant*
ii. *Whether the procedure was followed*

Based on the CMA records, it is not disputed that the applicant was the employee of the respondent (exhibit D1). The applicant was terminated by reason of gross misconduct which is dishonest (exhibit D12). It is a trite law that termination has to be fair. Section 37(2) of the Employment and Labour Relations Act [CAP. 366 R.E. 2019] provides so.

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Section 39 of the same Act, provides the onus to prove that termination of employment is fair lies on the employer. As well, rule 9(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 enjoins the employer to follow a fair procedure when terminating an employee's employment which may depend to some extent, on the kind of reasons given.

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Exhibit D5 provides the allegations against the applicant as hereunder: -

- *Failure to disclose and obtain proper employer's endorsement for external loan processing.*
- *Failure to repay dues under the above credit facility despite several oral and written remainders from Aspen Finance requiring to regularize such account.*
- *Failure to protect bank's image from a possible reputational risk associates with his act.*

The CMA award shows only two allegations were proved and they were termed to be as reason for termination. Those are; -

- *Failure to repay dues under the credit facility despite several oral and written remainder from Aspen Finance requiring him to regularize such account* and

- *Failure to protect bank's image from a possible reputational risk associates with applicant's act.*

In its determination, the court notes the advocate for the applicant's concern that the applicant did not know bank policies. But the record has it that, the applicant applied for the loan at Aspen Finance Tanzania of TZS. 1,000,000/= (exhibit D2). He failed to pay the loan and that he was reminded via email to repay the loan (exhibit D3).

Based on conversation in exhibit D3, Aspen wrote a letter to the Human Resource of the respondent informing her about unpaid loan of the applicant and asked for help (exhibit D2).

For that matter the issue here is not about the misconduct done by the applicant but about the applicant not to know whether such an act done by him amounted to a misconduct as per bank policies.

In exhibit D1 (Offer of Employment) the court notes clear that the bank policy apparently stated therein. For easy reference: -

*"**RE: OFFER OF EMPLOYMENT***

...

1. PROBATION

...

...

Your employment shall be governed by the Bank's policies and procedures as contained in the Amana Bank Human Resources Manual and as may be amended from time to time."

In the case of **Hotel Sultan Palace Zanzibar vs. Daniel Laizer & Another**, Civil Application No. 104 of 2004 (unreported), it was held that:

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"...It is elementary that the employer and employee have to be guided by agreed terms governing employment. Otherwise, it would be a chaotic state of affairs if employees or employers were left to freely do as they like regarding the employment in issue..."

As a reasonable man, the applicant ought to know about Bank policies as it is one of the agreed terms found in his offer of employment. The applicant's offer of employment was also signed by him. That means, when signing the document, he knew what he was agreeing upon.

From the above finding, I agree that the CMA was right to hold that there were reasons for termination of his employment contract.

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On the second issue of procedure, it can be stated that the procedure for terminating an employee is provided for under rule 13(1-13) of G.N. No. 42 of 2007. The rule lists down the procedure to be applied.

Looking at the procedure applied to terminate the applicant from employment; I have found that there was complains brought against the applicant by Aspen Finance Tanzania about the loan he took and couldn't repay (exhibit D2). The applicant was informed via a letter about the complaints and was supposed to answer in three days (exhibit D5). He was given a notice to disciplinary hearing dated 13th January, 2021 (exhibit D8). The disciplinary hearing was conducted on 18th January, 2021, which took more than 48 hours from the date the notice was given to the applicant (exhibit D11).

By and large, it is proven that the procedure for terminating the applicant from his employment contract was followed. On such a note, I find no need to fault the arbitrator's findings. This application therefore has no merit. It is hereby dismissed with no order as to costs.

A.K. Rwizile

JUDGE

26.10.2022