IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 470 OF 2020

BETWEEN

STANDARD CHARTERED BANK..... APPLICANT

VERSUS

ANITHA RUKOIJO ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The aggrieved applicant has lodged this application under the provisions of Section 91 (1)(a); 91(2),(a),(b), 91(4), (a)&(b) and 94 (1) (b), (i) of the Employment and Labour Relations Act, Cap. 366 R.E 2019 ("the Act") together with the provisions of Rules 24 (1), (2) (a),(b),(c),(d),(e),(f); 24 (3) (a), (b), (c), (d); and Rule 28(1) (d) and (e) of the Labour Court Rules, G.N No. 106 of 2007("the Rules"). She is moving the court for the following:

1. That this Honourable Court be pleased to call for the original CMA records in Labor Dispute No. CMA/DSM/KIN/1034/18/117 decided by Hon. Wilbard, G.M Arbitrator dated 29th May 2020 delivered on 09th September 2020 and inspect the records and proceedings to satisfy

itself as to the correctness, rationality and propriety of the findings of the Commission for Mediation and Arbitration on the entire Award.

2. That, the Court may be pleased to revise, quash and set aside the impugned Award and proceedings and thereafter determine the dispute on its merits in the manner it considers appropriate.
3. Any other reliefs that the Court deems fit to grant.

The brief background of the matter dates back to 07th October 2014 when the Respondent was employed by Applicant. The employment formally came to an end on the 19th September, 2018 for reasons of poor work performance of her duties as a Relationship Manager. The respondent was eventually terminated vide EX-S7. Aggrieved by the termination, the respondent successfully referred the dispute to the Commissions for Mediation and Arbitration for Kinondoni ("The CMA") through Labor Dispute No. CMA/DSM/KIN/1034/18/117 ("the Dispute"). The CMA found the termination of the applicant to be substantively unfair and ordered compensation to the tune of Tshs. 45,770,000/-. Aggrieved by the said decision, the applicant has lodged this application raising the following legal issues:

a) Whether it was proper for the trial arbitrator to hold that the respondent was not availed time to improve her performance.

b) Granted the exhibited efforts by the Applicant, whether the arbitrator is justified to hold that the Applicant had to afford the Respondent the required training.

c) Whether the trial arbitrator did properly evaluate the entire evidence placed before the CMA prior to making his finding that the employer did not carry out any investigation behind failure by the Applicant to meet her performance targets.

d) Whether the trial arbitrator was justified in law and evidence to punish the Applicant by in awarding the respondent twelve months remuneration and severance pay after all the evidence that proved the respondent's underperformance.

On those issues, the applicant is seeking for the following reliefs:

a) That this Honourable Court be pleased to revise, quash the proceedings and set aside the impugned Award with reference No. CMA/DSM/KIN/1034/18/117 for undermining productivity and competitiveness at the Applicant's workplace.

b) Remedy the injustice by and confirming the termination of the Respondent's employment contract.

c) That this Court be pleased to make such other orders as it may deem fit.

The application was disposed by way of written submission, the applicant's submissions were drawn and filed by Ms. Glory Venance, learned advocate while the respondent's submissions were drawn and filed by Mr. Emanuel Mbuga, learned advocate. Much appreciation to the well-researched comprehensive submissions of the parties which I shall take on board in determining the issues before me. What I have gathered from the decision of the CMA and the parties' arguments therein, the applicant is faulting the award of the CMA in so far as the termination of the respondent was found to unfair both substantively and procedurally. In summary of the legal issues raised, the applicant is particularly moving the court to determine whether it was proper for the trial arbitrator to hold that the respondent was not availed time to improve her performance. Further that in considering the exhibited efforts by the Applicant, whether the arbitrator is justified to hold that the Applicant had to afford the Respondent the required training and whether the arbitrator properly evaluated the entire evidence placed before

the CMA prior to making his finding that the employer did not carry out any investigation behind failure by the Applicant to meet her performance standards. As for me, all the first three issues on availing time to the respondent, evaluation of evidence and not affording the respondent training lie in the substantive part of the fairness. The last issue on conduct of investigation along with evaluation of evidence, lies on the procedural fairness of the termination.

It is pertinent to note that even in a case of poor performance like the one at hand, the yardstick of the reason and procedures remains "fairness". Under Section 37(2)(a)&(b)(i) of the ELRA, termination is said to be unfair if the employer fails to prove that the reason for the termination is valid and fair and a reason if fair if it is related to the employee's conduct, capacity or compatibility. Under Rule 17(1) the Employment and Labour Relations (Code of Good Practice) Rules GN 42 of 2007 ("the Code"), in determining whether a dismissal for poor work performance is unfair, the court is directed to consider whether or not the employee failed to meet a performance standard. In case it found that the employee did not meet a required performance standard, then the court has a further duty to see whether or

not the employee was aware of or could reasonably be expected to be aware of the required performance standard.

The other important aspect under the Rule 17(1) of the Code is that if the employee is found to have been aware of the existence of such standard, then the court should also see whether the employee was given a fair opportunity to meet the required performance standard. If all these are found on balance of probabilities, then the other important issue to look upon, since there other disciplinary measures in employment and labour relations. The court has to determine whether dismissal was an appropriate sanction for not meeting the required performance standard. It is now to look at the records and see whether such elements were proved.

On the first issue on whether it was proper for the trial arbitrator to hold that the respondent was not availed time to improve her performance, Ms. Venance referred the court to page number 9 of the impugned award where the arbitrator held that the Commission found that complainant was not availed time to improve and no training was conducted to the complainant hence concluded that the termination was unfair procedurally and substantively. She argued that as per the evidence of DW1 at page 2 of the award, the respondent performance started to fall since 2017 and this

was not disputed by the respondent on her evidence. Exhibit S1, S2 and S3 collectively shows that the respondent underperformance started way back 2017 and she was put on Performance Improvement Plan (PIP) since 1st November 2017 (see exhibit s. 2) and the demand for explanation on the underperformance was served on 9th August 2018 i.e. ten months later after she was put on the PIP (see paragraph 1 of exhibit S1).

She then referred to Rule 10(1) of the Code where six months is provided as enough probationary period necessary to assess the suitability of freshly engaged employee. Further that Rule 18 (3) of the same Code provides that reasonable time to improve shall depend on the nature of the job, extent of the poor performance, status of the employee, length of service etc. arguing that the 10 months afforded to the Responded during the Performance Improvement Plan (PIP) was excessively reasonable time required of the Respondent to improve otherwise any continued extension would expose the Applicant Bank to the risk of inefficiency and ultimately closure of business. That the undisputed poor performance was zero in some areas (exhibit S. 5) while the respondent was serving at managerial level and from the nature of the job that of a professional banker, it was not feasible in all respects to maintaining her in the position amidst the exhibited

underperformance. That the act of perseverance exhibited by the applicant to continue with the respondent as employee despite the underperformance for so long giving her time to improve under PIP shows that the Applicant employer had all good intentions more than anticipated under Rule 18 (5) (a) of the Code. That the Rule provides that an opportunity to improve may be dispensed with if the relevant employee holds a managerial position and the Respondent in this matter was a Relationship Manager but nevertheless she was afforded the exhibited time to improve her underperformance all to no avail.

In reply, Mr. Mbuga submitted that the time used was not ten months rather the PIP were placed from November to December, 2017 and second phrase January to February, 2018 only. This was when the respondent was placed under performance, and that this time was not sufficient to weigh an employee who had worked for more than three years without any warning or underperformance issue. In alternative, he argued that if as submitted by the Counsel for the Respondent that ten months were used to assess her which we agree it is sufficient time, his submission was that the Respondent was pregnant something that she at all times tried to work for the Applicant but they still opted to terminate her while she was seven months pregnant

as prove in exhibit A-6. That they should have considered her situation towards assessing her in relation to the other.

On my part, I have noted the allegation that the respondent failed to meet performance targets that had been discussed and jointly agreed between her and her immediate supervisor thereby occasioning failure to her department to meet its objection. (EX-S7). It would appear that the dispute started sometimes back in the year 2017 when the Respondent was put on the Performance Improvement Plan (PIP) in which upon evaluation for three times, it was observed that in all the 4 quarters of the year 2017, her performance results became inadequate and below the expected level of improvement (EX-S1 and EX-S2). The Applicant held several performance management discussions with the complainant and pointed out areas that the Respondent had to work harder and improve so as to bring her performance results to an acceptable level. It was further agreed that a review would be conducted to the Respondent to assess the extent of her improvement, however, it was noted that the performance to the desire level was never met in three different evaluations.

The respondent was eventually given a warning by the Applicant on 9th February 2018 (EX-S1) and was accorded another chance to improve, in

which her levels of performance never improved to the desired level. The respondent was demanded to give an explanation as to her incompetence (EX-S3) and was invited to attend a performance hearing on 24th August 2018 (EX-S5 & EX-S6). Therefore at this point, I am in agreement with Ms. Venance that the respondent was afforded sufficient time to improve her performance under the PIP. All these evidence auger well with the provisions of Rule 17(1) of the Code, unfair, there was sufficient evidence to show that the employee failed to meet a performance standard which she was aware of. Furthermore, the evidence showed that the employee was given a fair opportunity to meet the required performance standard as argued by Ms. Venance.

The next issue is whether the arbitrator was justified to hold that the respondent was not afforded with required training. Ms. Venance submitted that at page number 9 of the award the arbitrator held that no training was conducted to the respondent herein hence the termination was unfair. Her argument is that the respondent was serving at a managerial level hence her knowledge and experience qualified her to judge if she was meeting standards or not. Moreover in all her evidence before the CMA, she never testified if she was denied any training to improve nor did she tender any

evidence that she ever asked for and denied any training in the whole period of underperformance.

In reply, Mr. Mbuga submitted that the testimony of PW 1 and also exhibit A3 is that she sought for training but she was not availed for the same, different from the submission of the Applicant that she never sought for training. That the Applicant's intention was not to raise the standards for the Respondent to fulfill the new requirements of the PIP, rather the same were purposely brought to be a reason for her termination. He supported his submissions by citing the case of Tanzania Breweries Ltd. vs. Leo Kobelo, Rev. No. 211 of 2014 [LCCD] Vl. I at pg 134 this Court held inter alia that;

> *"Considering the procedure for termination, it is in record and the award that the procedure which were used for termination of the Respondent were not adhered to. Procedural irregularity relates to the Applicant's failure to provide or have in place appreciated action like training to be conducted to improve performance of the Respondent before termination."*

At this point, I am in agreement with Ms. Venance and the evidence of Exhibit A3 what was being lamented was training on PIP which was well elaborated and explained in exhibit S2 signed by the respondent when the

PIP process started way back November 2017 and not training on improvement of the respondent's performance. Further to that, I have also had a close look at EXA5, a reply to the demand for explanation, the respondent admitted not to have been performing well giving reasons therein. She admitted to have had tangible pipelines but they did not mature after clients chose not to go with it. She agreed that she needed to put more efforts in the NTB acquisitions and building pipeline. But as correctly argued by Ms. Venance, there is nowhere in her explanation that the respondent requested for additional training. Had a training been an issue, she would have expressly said so in EXA5. The treatment of employees in managerial position is also exempted under Rule 18(5)(a) of the Code where provides:

18 (5) of the Code which provides:

"*An opportunity to improve may be dispensed with if-*

(a) The employee is a manager or senior employee whose knowledge and experience qualify him to judge whether he is meeting the standards set by the employer;

Therefore whichever way, since the respondent was in managerial position and in replying (A6) she did not request training or indicate that she

needed any, then the applicant cannot be condemned on a mere reason that training was not provided.

The last issue on conduct of investigation, Ms. Venance submitted that the said investigation was carried out which diagnosed key result areas pointing to the underperformance of the Respondent. That it is from the said investigation the applicant and the respondent were able discuss and agree on the way forward including the PIP steps (see exhibit S2). The respondent was given a chance to improve the complained of underperformance as explained in the preceding paragraphs on issues number one and two. She submitted further that the reasons assigned by the respondent to justify her underperformance i.e fall of commercial interest, minimum usage of foreign currency, and removal of fiscal cash by the government from commercial banks came as an afterthought and remained unsubstantiated since they were never mentioned, let alone, advanced by the Respondent at any stage during the PIP period. She hence argued that the finding by the trial arbitrator that no investigation was conducted on the reasons for underperformance is misplaced for it not being supported by the evidence placed before the CMA by the respondent on the existence of comprehensive and institutionalized performance Improvement Plan.

In reply, Mr. Mbuga submitted that the presence of PIP does not replace or show adherence of the mandatory procedure of investigation, rather one has to know first the reasons as to why underperformance has been brought. He pointed out that this Court had in several instance held that despite the presence of the said PIP's, still the same did not prove adherence of investigation, citing the case of Bank of Africa (T) Ltd vs. Bruce E. Massawe, Rev. No. 760 of 2019 at the last paragraph of page 4 and first para of page 5 of the same shows that the employee was placed under performance Improvement Plan (PIP) but still despite there being the said PIP still the Court under pg. 14 held inter alia that investigation was not conducted and thus unfair termination.

He submitted further that failure to prove that they conducted investigation makes the whole steps like PIP's warning letter to be premature since it shows that the intention was not to take out the best or improve the employee but to terminate. He supported this submission by citing the case of **MIC Tanzania Ltd vs. Chris Stratham, Rev. No. 271 of 2014, [LCCD] 2015 Vl. II at pg 245** where it was held inter alia that:

"Also I note that the warning issued to Chris Stratham was pre-mature because applicant had not yet exhausted the remedy provided

under Rule 18 of GN 42/2007 as there were investigations conducted by the Applicant on that effect."

He then submitted that investigation could raise awareness as to why the alleged underperformance, in exhibit S. 4, A6 and A3 the Respondent stated different reasons like policy change by the BOT on foreign currency, mortgage sale in Dar es Salaam like how could a person buy a house of Tshs. 300M instead of taking a loan of Tshs. 100M to build the same house in his or her favorable place, arise of different competitors with different affordable deals and also the condition of the Respondent as at the time she was terminated she was 7 months pregnant. All these and others could be necessary being found under investigation. This Court in the case of cited above of **Bank of Africa (T) Ltd vs. Bruce E. Massawe, Rev. No. 760 of 2019** at pg. 13 had discussed the essence and key points towards investigation.

"It is our submission that investigation was not conducted at all and this was what was held in the CMA, and even in this revision that has not been shown to have been conducted nor are there any reasons to waive the same."

I will start by disagreeing with Mr. Mbuga in his argument that in exhibit S. 4, A6 and A3 the Respondent stated different reasons like policy change by the BOT on foreign currency, mortgage sale in Dar es Salaam like how could a person buy a house of Tshs. 300M instead of taking a loan of Tshs. 100M to build the same house in his or her favorable place, arise of different competitors with different affordable deals. That all these and others could necessary be found under investigation. All the reasons that are stated by Mr. Mbuga to have replied to the respondent's reply in EXA6 are baseless. It was actually the respondent, as a person of managerial position to have established those facts with evidence during her reply on her under performance. She could not have raised mere allegations and stories and expect the employer to go and do investigation for her, after all, she was paid salary to do that job.

I should also take time to explain the concept of investigation in disciplinary procedures, this is because many a times, I see confusion in courts where parties mistake the investigation prior to a disciplinary hearing to the investigation done by professional investigators in criminal cases. In employment and labour regime, there are no hard and fast rules on how investigation should be conducted, A disciplinary investigation is done for the

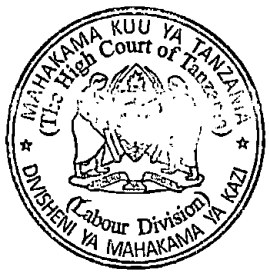
purpose of looking further into the conduct of an employee, or to ascertain the facts surrounding an incident or allegation, prior to taking disciplinary action. It is not meant to be trying to prove guilt, rather the person investigating should be finding out if there is an issue that needs to be addressed. Therefore has to establish the employer's efforts to make a finding of facts surrounding the alleged misconduct. Under Rule 13(1) of the Code, the purpose of investigation is to ascertain whether there are grounds for a hearing to be held and not to see whether the employee is guilty of misconduct because that will be done in due course of hearing.

On that note, it is also important that investigation in labor disputes involves any concerted efforts to establish a shortfall. Now for the case of under/poor performance, unlike in other misconduct where the employer fact finds whether the misconduct was done, the investigation includes the employer's follow up on the performance of the employee. Periodic Reviews therein and the involvement of the applicant in the process in order to give a chance for improvements. Feedback on the performance and the time frame for improvements are part of the investigation. By the time the disciplinary hearing is held, the employee would have been involved in the process so much to be aware of the facts that are tabled before her, because

that indeed is the purpose of investigation, to fact find and serve the employee in advance so that she/he can be aware of the accusation before her. In cases of poor performance, for as long as the employer proves adherence to the requirements of Rule 17 of the Code, the issue of investigation "not being conducted" like police style cannot be used to vitiated disciplinary hearing. As shown earlier while discussing the first issue, the applicant agreed to the provisions of Rule 17(1) to the requires standards hence the issue of investigation could not vitiate the procedure of the applicant. Therefore since the case of **Bank of Africa (T) Ltd vs. Bruce E. Massawe** is persuasive to me, I am holding a different opinion from it.

Having made the above findings, I am satisfied that at the CMA, the applicant managed to prove that the termination of the applicant was substantively fair. Since the respondent did not complain about the procedural irregularity, I find the application to have merits. The award of the CMA is hereby revised, quashed and set aside.

Dated at Dar-es-salaam this 08th day of March, 2022



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S. M. MAGHIMBI

JUDGE