IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 162 OF 2021

BETWEEN

FINCA MICROFINANCE BANK ..... APPLICANT

VERSUS

ALEX KAMUZELYA ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J

The employment relationship that existed between the parties herein dates back to 28/10/2017 when the respondent was employed by the applicant as a Recovery Manager. It then ended on the 24/04/2019 when the respondent was terminated from employment on the ground of poor work performance. Aggrieved by the termination, the respondent referred the matter to the Commission for Mediation and Arbitration for Kinondoni (CMA) where it was registered as Dispute No. CMA/DSM/KIN/382.19/186 ("the Dispute"). In the said dispute, the CMA award was in favour of the respondent where the applicant was ordered to pay the respondent a total amount of Tshs. 32,000,000/= as compensation for the alleged unfair termination and leave allowance.

Being dissatisfied by the CMA's award, the applicant preferred this application urging the court to determine the following legal issues:-

i. Whether the Arbitrator erred in law to consider the requirements of Rule 18 of the Employment and Labour Relations (Code of Good Practice) Rules GN 42 of 2007 ("the Code") as the same is not applicable to employees who are in managerial position.

ii. Whether the Arbitrator erred in holding that the applicant did not observe the requirements of Rule 13 of the Code, while there was evidence to prove the same.

iii. Whether the Arbitrator erred in law and fact to hold that the targets given to an employee were unreasonable and inexecutable without a lawful justification.

iv. Whether the Arbitrator erred in failing to consider admissions made by the respondent on his poor performance during the hearing by review committee.

v. Whether the Arbitrator erred for failure to properly analyses and examines evidence tendered before him.

vi. Whether the Arbitrator erred in law for failure to consider summary of closing submissions submitted by the parties as required by the law.

vii. Whether the Arbitrator erred to issue a ruling instead of award contrary to the law.

viii. Whether the Arbitrator erred in law in holding that the applicant terminated the respondent without fair reasons and fair procedures.

ix. Whether the Arbitrator erred in granting compensation without considering the principal and guidelines provided under the law.

On those legal issues, the applicant moved the court to call for and revise the dispute and further quash and set aside the award of the CMA due to improper procurement and irregularities. The respondent opposed the application praying for its dismissal. The application was argued by way of written submissions. The applicant was represented by Ms. Yusta Peter Kibuga, Learned Counsel whereas Mr. Nehemia Gabo, Learned Counsel was for the respondent.

Having gone through the issues that are raised by the applicant, I find that for the proper determination thereon, I should cluster them in three, the issue is whether the termination of the applicant was substantively fair where I shall determine whether Rule 18 of the Code is applicable to employees who are in a managerial position and whether non-performance was proved by the applicant in the required standards.

The second is on the procedures followed before termination of the applicant, whether they were fair and the last one is on the reliefs that the parties are entitled to.

Arguing in support of substantive fairness, Ms. Kibuga submitted that the testimony of DW1 clearly shows that the respondent's performance was below the standard as the result the company put hm into performance improvement plan for three months which among other things shows the goal set, employer's recommendations and the assistance that he may need in order to improve his performance. That he was also provided with the policy showing the standard required pursuant to Rule 18 (1) of GN 42/2007. Ms. Kibuga went on submitting that the three month's evaluation report (exhibit F2) tendered at the CMA contains the recommendations which were accepted by the parties, specific directives and the way to improve employee's performance. That the three month's evaluation report suffice the requirement of investigation adding that the whole process of employee's evaluation involved investigating the employee's performance and ascertaining the extent which the employee contributes to the unsatisfactory performance.

She then argued that the respondent was an employee of managerial position hence it gives the employer opportunity to dispense with the procedures provided under Rule 18 (5) of GN 42/2007. That the purpose of investigation under Rule 13 (1) of GN 42/2007 is to ascertain whether there are grounds for hearing to be held and that in the case of the applicant, the said investigation was conducted prior to disciplinary hearing.

Ms. Kibuga then submitted that the Arbitrator completely ignored the evidence tendered by the applicant because the finding that the targets set were unreasonable and unexecutable as stated by the Arbitrator at page 7 was not supported by any evidence. That the Arbitrator failed to consider the admission made by the respondent during the hearing of the review meeting where he admitted to have underperformed. She firmly submitted that the evidence on record proves that the respondent's performance was below standard and that the performance improvement plan was administered pursuant to Rule 17 (1) (e) of GN 42/2007.

It was further submitted that according to performance management guidelines (exhibit C2), which the respondent admitted to have been given in course of his employment, it is indicated that the

employee performance at the average of 2.0 to 2.75 is required to improve his performance. She stated that the respondent admitted that he performed at the average of 2.3 in the three months which he was under improvement plan. The counsel insisted that the respondent admitted to have performed below the required standard.

On the procedural fairness, Ms. Kibuga submitted that DW1 and DW2 testified that after the respondent failed to improve, he was summoned to appear before Performance Review Meeting which was held on 12th April, 2019 where the Committee recommended his termination after the finding that he performed below standards. Further that the Arbitrator failed to make reference to any provision of law which compels the employer to make evaluation for six months during the improvement plan and that the Arbitrator failed to make proper analysis of the evidence as in accordance with Rule 32 (5) of GN 67 of 2007 hence reached to a finding which is not supported with evidence and law.

Ms. Kibuga also submitted that there is nowhere in the ruling the Arbitrator made reference to the closing arguments of the parties contrary to the requirement of Rule 26 (4) and 27 (3) (d) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 (GN

67/2007). The law requires arguments rose in the closing submissions to be summarized in the award and that the Arbitrator's omission to summarize the closing submissions of the parties renders the award defective for not including necessary elements. Further that the Arbitrator in this case did not follow the guidelines provided under Rule 27 (1) of GN 67/2007 because she issued a ruling instead of the award contrary to the above-mentioned rule.

On the compensation awarded, Ms. Kibuga submitted that in granting compensation, the Arbitrator is required to establish the basis of granting certain amount of compensation. She argued that in this case, there was no basis for granting compensation because the respondent was fairly terminated. That compensation was granted in disregard of Rule 32 (5) (a) (b) (c) (d) (e) (f) of GN 67/2007. To support her argument, Ms. Kibuga cited the case of **Deus Wambura v. Mtibwa Sugar Estate Limited, Revision No. 3 of 2014** (unreported) and prayed for the court to quash and set aside the arbitral award.

In reply, Mr. Gabo submitted that the applicant's assertion is baseless since the CMA's record are self-explanatory that the respondent's performance in 2018 was excellent and he was awarded

salary increment thereto. That the purported applicant's investigation would be valid if the respondent underperformed in 2018 and that DW1's testimony did not show poor performance of the respondent before January, 2019. He added that there is no evidence on record to prove that the respondent was notified on his performance and placed him on performance improvement plan contrary to the company performance management policy and procedures. He submitted further that the applicant purposely disregarded and omitted results of evaluation done in the end of December, 2018 as per employee job contract and performance evaluation guidelines which revealed good performance of the respondent.

Mr. Gabo submitted further that the applicant purposely decided to take recovery department monthly performance evaluation report as Performance improvement plan for the respondent so as to terminate him. He added that these monthly evaluations were done every month since 2018 and its purpose was to manage monthly performance of the department and only evaluate performance of that specific month and not overall evaluation which is usually done in June and December as indicated in the employment contract.

The counsel submitted further that the applicant did not conduct investigation regarding poor performance of the respondent as per Rule 18 (1) of GN 42/2007. He insisted that the applicant falsely invoked monthly performance of the recovery department meant to evaluate performance of that specific month which was not at any rate concerned with the respondent's personal performance which was normally done in June and December every year. That the applicant did not tender sufficient evidence to prove that there was prior investigation of the respondent's performance and that the respondent was not involved in any purported investigation.

Mr. Gabo submitted further that the targets given to employee for monthly review were unreasonable and in executable as the performance review reports does not reflect the performance standards. That the admission of the respondent in the performance review meeting was on late submissions of reports in December, 2018 where the respondent also explained in the relevant meeting the reasons for late submissions. That the applicant ignored the normal plan to evaluate the respondent's work performance in June and December annually and that there is no evidence to prove that the respondent failed to meet standard. That the respondent was unaware of the standard set by the

applicant and the applicant invoked the process of performance improvement plan for poor performance which is contrary to Rule 17 (1) of GN 42/2007.

Mr. Gabo went on to submit that the Arbitrator delivered an award and not ruling as contested and that the said decision was based on the concrete evidence of the parties. Mr. Gabo concluded by urging the court to award the respondent 12 months instead of 6 months awarded by the Arbitrator and further prayed that the court uphold CMA's award and order 12 months compensation instead of 6.

After going through the submissions for and against the application, and as I said earlier, the issues are clustered in three, whether the termination of the respondent was substantively fair where I shall determine whether Rule 18 of the Code is applicable to employees who are in a managerial position and whether non-performance was proved by the applicant in the required standards. The second is on the procedures followed before termination of the applicant, whether they were fair and the last one is on the reliefs that the parties are entitled to.

Before addressing the raised issues, I find it relevant to determine the seventh ground of revision. The applicant is alleging that Arbitrator

erred to issue a ruling instead of award contrary to the law Rule 27 (1) of GN 67/2007. The relevant provision provides as follows: -

'Rule 27 (1) The Arbitrator shall write and sign a concise award containing the decision within the prescribed time with reasons.'

I have carefully considered the applicant's contention in light with the above cited provision and failed to capture his basis of argument. Looking at the impugned decision, in my view it is the award which was composed in accordance with the above cited provision. The fact that it is written "UAMUZI" meaning "RULING" instead of TUZO-AWARD" cannot be said to have prejudiced the applicant in any way. The main issue to consider is whether the said award has complied with the provisions of the Rule 27(3) of the G.N. No. 67/2007 which in this case, it has.

The applicant has also contended that the Arbitrator did not consider the final submissions of the parties contrary to Rule 26 (4) of GN 67/2007. Going through the award it is true that the Arbitrator did not state anything about the final submissions of the parties. In my view the Arbitrator ran into error for not acknowledging the final submissions. Since they are in record, he should have stated a word about what the

parties submitted thereto. However, the cited provision does not mandatorily require the Arbitrator to consider the alleged submissions because as it is trite law, submissions are not evidence. The final submissions are persuasive arguments which summarises the evidence of the parties so as to facilitate the court in considering that evidence for determination. Since the evidence of both parties was considered, there is no injustice occasioned to the parties for failure to acknowledge the final submissions. Such ground also lacks merit.

On the substantive fairness, Ms. Kibuga argued that the arbitrator erred in considering the requirements of Rule 18 of the Code as the same is not applicable to employees who are in managerial position. I think Ms. Kibuga was talking of Rule 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;

(b) The degree of professional skills that is required is so high that the potential consequences of the smallest departure from that high standard are so serious that

even an isolated instance of failure to meet the standard may justify termination.'

The rule does not exclude the employees in managerial position from its application in a mandatory form. This is because if that was the case, then the law would have clearly state that *"this **rule shall** not be applicable to the employees in managerial position".* However, from its wording, the rule may only be dispensed with if the employee is in a managerial position, not meaning that is not applicable to those on managerial position. Therefore, it was also wrong for the arbitrator to make it mandatory that the applicant should have applied the provisions of the Rule 18 because the Code gives a leeway for the employer to dispense with it if the employee they are dealing with is in managerial position.

Further to that, in the case at hand, the dispensation of the rule is explained in Rule 18(5)(a) in situation where 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 the expectation of the law is that when you are a senior or managerial employee, then you are supposed to have enough

knowledge and experience to judge on your own on whether or not you are meeting those standards.

Now going to the poor performance that the respondent was terminated for, the procedure is well elaborated under Rule 17 of the Code which provides for factors to be considered on termination for poor work performance. The factors are outlined as hereunder:

> *"17(1) Any employer, arbitrator or judge who determines whether a termination for poor work performance is fair shall consider-*
>
> *(a)* ***Whether*** *or not* ***the employee failed to meet*** *a performance standard;*
>
> *(b)* ***Whether the employee was aware,*** *or could reasonably be expected to have been aware, of the required performance standard;*
>
> *(c) The* ***reasons why the employee failed to meet*** *the standard; and*
>
> *(e) Whether the employee was afforded a fair opportunity to meet the performance standard." (Emphasis supplied)*

The issue to be determined is whether the applicant proved the respondent's misconduct since the respondent being in a managerial

position, ought to have been aware of the required standard. The record shows that the respondent was terminated on the basis of poor performance as indicated in the termination letter. As per a letter dated 17th December, 2018, titled as "Late or/and non-submission of Collections Report" (exhibit F1) the respondent was directed to submit daily collection reports. The applicant strongly alleges that the respondent failed to perform on the required standard despite several reminders. The record reveals further that on 22/03/2019 the respondent was served with a letter of reminder to improve his performance (exhibit F2). However, despite several reminders, the respondent did not improve his performance until when he was summoned to a disciplinary hearing. At the disciplinary hearing, the respondent admitted to have not reached his performance required standards but he stated reasons for his failure as reflected in the Minutes of the performance review meeting (exhibit F4).

In deciding about fairness of the reason on poor performance a judge or Arbitrator is required to consider the provision of Rule 17 (1) of GN 42/2007. On the basis of the evidence on record, it is my view that the respondent failed to perform as required. The respondent argued that he scored 2.4 which only needed improvement performance but not

termination. In my view the respondent being a Recovery Manager he was expected to had higher performance ahead of his subordinates. The performance review minutes shows that the respondent failed to meet the targets agreed. Under Rule 9(4)(b) of the Code, capacity is one of the fair reasons for termination. In such cases, the employer has to only prove the underperformance. In this application it is my view that termination on the ground of poor performance is in accordance with the relevant provision. Had it been considered by the Arbitrator he would have reached to different conclusion.

Therefore, I find that the applicant had valid reason to terminate the respondent from employment.

Turning to the second issue, the court is called upon to determine whether the applicant followed the termination procedures in terminating the respondent. The procedures for termination on the ground of poor performance are provided under Rule 18 of GN 42/2007. The respondent is alleging that he was not given a chance to improve his performance. With due respect to his allegation

'Rule 18 (5) An opportunity to improve may be dispensed with if-

(c) 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;

(d) The degree of professional skills that is required is so high that the potential consequences of the smallest departure from that high standard are so serious that even a isolated instance of failure to meet the standard may justify termination.'

In this dispute, the respondent at hand was in the managerial position thus, pursuant to the above cited provision it was not mandatory to afford him the opportunity to improve. The rationale behind for not affording him time to improve is stated above in the quoted provision. The respondent being in managerial position is expected to have high skills and experience of the job positioned. Despite the exemption provides for under the Code, in this case the respondent started to underperform from December, 2018 and he was afforded the opportunity to improve for three months but failed to do so. Under such circumstance it is my view that the respondent was not entitled to more time to improve his performance.

The Arbitrator stated that the targets set by the applicant were unrealistic. I am not in agreement with his findings. The challenges for failure to meet targets narrated by the respondent in the performance review meeting should have been tabled before his supervisor to allow the applicant to change the targets agreed. From December, 2018 the respondent was informed of his poor performance but he never stated the reason for his failure until when he was summoned to a meeting. Therefore, the challenges stated by the respondent were not backed up with evidence.

I have also observed other procedures for terminating an employee on the ground of poor performance as they are provided under Rule 18 of GN 42/2007, the same were adhered to by the applicant. As properly analysed by the Arbitrator the respondent was informed of his performance, summoned to performance review meeting where he was found guilty and eventually terminated. The Arbitrator's finding that the applicant did not conduct investigation to know the reason for the respondent's unsatisfactory performance is not backed up with evidence because in cases of poor performance, what the employer is supposed to do is inform the employee, set target and time to improve performance and if that does not happen, proceed with other

disciplinary measures. In this case you would wonder what the investigation report would be mandatory for because the employee had all the information about his performance. That finding is therefore without basis because in the performance review meeting minutes, it is clearly stated the reason thereof, being the respondent's failure to manage his subordinates.

On the basis of the foregoing findings, it is my view that in this case the applicant discharged his duty to prove the alleged reason for termination on balance of probability; that the respondent's performance was unsatisfactory and he followed proper procedures in terminating him.

Turning to the last issue as to parties' reliefs, as it is found that the respondent's termination was fair both substantively and procedurally, I find the respondent was not entitled to the remedies awarded to him by the Arbitrator. In conclusion, the application is hereby allowed by revising and setting aside the award of the CMA.

Dated at Dar es Salaam this 04th March, 2022.

S.M. MAGHIMBI
JUDGE