IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REV. NO. 306 OF 2020

(C/F Labour Dispute No. CMA/DSM/ILA/R.440/2018/352)

BETWEEN

ABDALLAH KINENEKEJO	.....	**1ST APPLICANT**
PETER MADAHA	.....	**2ND APPLICANT**
KATASO SOPHRES MAGESA	.....	**3RD APPLICANT**
TUTINDIGA MWAKAJILA	.....	**4TH APPLICANT**
DANIEL JOHN	.....	**5TH APPLICANT**
LODRICK MOLLEL	.....	**6TH APPLICANT**
BUPE MWAKINULA	.....	**7TH APPLICANT**
STANLEY MMANYI	.....	**8TH APPLICANT**

AND

NATIONAL MICROFINANCE BANK (NMB BANK PLC) ..... **RESPONDENT**

JUDGMENT

S.M. MAGHIMBI, J:

The eight (8) applicants herein were employees of the respondent herein (also referred to as the employer interchangeably) in different capacities, but they all had one thing in common, they were all representatives of a Trade Union FIBUCA in their employer's offices in different branches. At some point in time in the year 2018, the employer was in the process of procuring Medical Service Provider and in due course

of the process, the employees of the respondent were involved through their Trade Union leaders who are the applicants herein. It is in the procurement process that the applicants have been accused of conducting an unauthorized employee opinion survey regarding the identification and selection of a medical service provider. The accusations were that the applicant acted by calling different Branch Managers and Managers for Customer Experience soliciting them to perform unauthorized opinion survey to branch staff on Health Insurance Service Provider selection. They were initially suspended and eventually terminated from employment.

Aggrieved by the termination, the applicants lodged a Labour Dispute No. **CMA/DSM/ILA/R.440/2018/352** at the Commission for Mediation and Arbitration for Ilala ("the CMA") claiming for unfair termination. The CMA was not convinced by their claims and dismissed the dispute. Aggrieved by the award, they have lodged this application under the provisions of Section 91(1) (a) and (b), section (2) 91(a), (b), (c) and section 94(1), (b), (i) of the Employment and Labour Relation Act, Cap. 366 R.E 2019 ("the act) and Rules 24(1),(2),(a),(b),(c),(d),(e) and (f), 24(3), (a),(b),(c),(d) and 28(1), (c),(d) of Labour Court Rules 2007 G.N.

No. 106 of 2007 ("The Rules"). They are challenging the award dated 19th June 2020 and are moving the court for the following:

1. That this Honourable Court be pleased to revise and set aside the decision of Commission for Mediation and Arbitration at Dar es salaam Zone, in Arbitration matter CMA/DSM/ILA/R/440/2018/352, delivered by Hon. Mbena, M.S. (Arbitrator) on the 19the June, 2020.
2. That the Honourable Court having quashed the Arbitrator Award be pleased to determine the matter in favour of the applicants by holding that the termination of the applicants was not fair procedurally and substantively and be pleased to reinstate the applicants in their former position without loss of benefit and other remedies in accordance to the law applicable that is Employment and Labour Relations Act.
3. Any other reliefs that the Honourable Court may deem it fit to grant.

The respondent opposed the application with the prayer for the dismissal thereto. The application was disposed by way of written submissions. The applicants' submissions were drawn and filed by Mr. Gabriel Mnyele, learned advocate while the respondent's submissions were

drawn and filed by Mr. Paschal Kamala, learned advocate. In their affidavit to support the application that was deponed by the first applicant, the applicants raised the following legal issues:

(a) Whether each of the applicants admitted to have committed disciplinary offences as charged

(b) Whether the respondent proved that the applicants had committed disciplinary charges as laid before them.

(c) Whether the procedure towards disciplinary committee who was a non-executive director of the company was a senior member of the management thus qualifying to act as a chairman of the disciplinary committee and whether the disciplinary committee was properly composed.

(d) Whether the chairman of the disciplinary committee who was a non-executive director of the company was a senior member of the management thus qualifying to act as a chairman of the disciplinary committee and whether the disciplinary committee was properly composed.

(e) Whether the evidence of the Secretary General of FIBUCA was necessary to justify the "conduct" of the applicants which was

not there and whether the honorable Arbitrator did not engage in conjecture in that regard.

(f) Under what capacity were the applicants charged and dismissed and whether the alleged conduct transgressed/amounted to abuse of offices of the applicants in accordance their contract of employments and Labor laws generally in their capacities as bank's officers.

(g) Whether the learned honorable arbitrator lawful shifted the burden of proof to the applicant to prove that the termination was fair instead of casting the same to the respondents in accordance to the law, the burden of which the respondent had failed to discharge.

(h) Whether the applicants as leaders of the union had a statutory right to use the systems and infrastructures of the employer, who has a statutory duty to facilitate and provide the same.

(i) Whether the hon. Arbitrator properly evaluated the evidence of every applicant and subsequent submissions in chief and whether failure to do so made her to reach wrong findings and decisions in the award.

(j) Whether the learned arbitrator erred in law or fact by failing to hold that the applicants were not fairly dismissed and thus grant the requested reliefs in the complaint.

Having considered the records of the application, there are two issues for determination as were tabled before the commission, whether the termination of employment was fair based on fair and valid reason and whether the procedure followed by the respondent terminating the applicant was fair.

Starting with the substantive fairness, the applicants challenged their alleged admission of the offence and questioned whether the respondent proved that the applicants had committed disciplinary charges as laid before them. They also questioned whether the evidence of the Secretary General of FIBUCA was necessary to justify the "conduct" of the applicants which was not there and whether the honorable Arbitrator did not engage in conjecture in that regard. The applicants also challenged the capacity in which they were charged and dismissed and whether the alleged conduct transgressed/amounted to abuse of offices of the applicants in accordance their contract of employments and Labor laws generally in their capacities

as bank's officers. All these issues are narrowed to one issue, the fairness of the substance of termination.

In their submissions to support the application, Mr. Mnyele submitted that the appellants were interdiction, tried and dismissed for the activities that they did as members and leaders of the trade union. That, according to the testimony of CW1, which to some extent tally with that of DW1, all the appellants, were Zonal representative at the employees of the Bank in their trade union FIBUCA. That FIBUCA had three agreements with the respondent providing the modus operandi under which they ought to operate. These are Collective Bargaining Agreement, Recognition agreement and Organization Right agreement (Exhibit P1 and P2 collectively).

Mr. Mnyele submitted further that clause 5 of Exhibit P1 provided that FIBUCA would be engaged wherever there was review at the medical schemes. He argued that in their capacity as zonal representative, the applicants were invited to participate in the process and that the exhibited minutes of the meeting in which FIBUCA was engaging the respondent through the Zonal representative lead by their own Secretary General. All went well until the meeting of 26th January, 2018 Exhibit D5 that ended in

acrimony due to unwarranted intervention by the Bank Managing Director *(page 69 of the proceedings)*. He argued that the reason for the interdiction of the applicant cannot be isolated from the process of consultation that was taking place between the management and the trade union.

Mr. Mnyele submitted further that the second reason as to why the termination was substantively unfair was because it breached the provision of Section 60(3) of the Act. He pointed out that in that section, it is provided that the employer must provide to a recognized union facilities to use for their activities. That the applicants were charged with abuse of Bank communication policy by communicating with fellow employees without seeking approval, though it has not been proved that there was such communication. His argument is that the applicants, as representative of the workers, were entitled to use the channel to communicate with their members to get their opinion on the matter. Representatives had to get approval of the members and that they could not properly advise the management without seeking the opinion of their members. Further that the provision in the manual that impose a condition/ approval before use is

illegal because it contravenes section 60(3) of the Act and that the said clause is 13.6. The dismissal could again not be fair in the circumstances.

Mr. Mnyele submitted further that under section 37(2), it is the duty of the employer to prove that there were valid and fair reasons for dismissal. He supported this argument by citing the decisions of the **Court of Appeal in the case of Dew Drop Co. Ltd versus Ibrahim Simwanza Civil Appeal No. 244/2020.** He then submitted that according to the charge sheet, the appellants were separately charged with the disciplinary offence abuse of office and violation of communication policy. That the respondent were duty bound to prove separately how each of the applicant was involved on the commission of a given disciplinary offence particularly so because at the disciplinary committee there were separate hearing. He argued that the law impose the duty on the employer to prove an offence not only at the disciplinary committee but also at the Commission.

In reply, Mr. Kamala first pointed out that the index of Applicant's application contains only the documents that were attached by the Applicant's list of documents, some of which were not tendered at the trial. That the Applicant has not attached the exhibits which were tendered by

the parties emphasizing that he will make submissions based on the exhibits that were admitted during the arbitration.

On the substance of the issue, the fairness of the reason for termination, he submitted that DW1 and more particularly in Exhibit D8, the evidence was to the effect that the Respondent wrote an email dated 24th November, 2017 to inform all Zonal Managers about initiation of procurement process for health service provider for the year 2018/2019. This email expressed involvement of all staff to give their inputs to be considered during tendering process and he cited Exhibit D8 which amplifies:-

> *"Please be informed, the current contract between NMB and Strategies is expected to end in near future so in order to make sure we continue receiving medical coverage without any disruption, the management intends to initiate procurement process for recruiting new service provider/ renewing the current contract if they will meet our requirements."*

He then submitted that eventuality, as per Exhibit D1, D2 and D3, it shows the terms of reference of the tender Committee, Selective Sourcing Approach and Request for Proposal. DW1 further stated under oath that

they preferred selective source approach because of the size which the service was required and that in the course, they selected for service providers, namely AAR Insurance Tanzania Limited, Jubilee Insurance Tanzania limited, National Health Insurance Fund and Strategies Insurance Tanzania Ltd. That in order to have a participatory approach, the Respondent involved the workers' trade union known as FIBUCA to represent the interests of employees in the selection process. He then argued that as exemplified by Exhibit D6, the Respondent sent a letter and informed FIBUCA the approach and reasons why the Management preferred selective source approach. That since then, the Respondent fully involved FIBUCA in the selection process to wit, there were numerous meetings as amplified by Exhibit D4 and D5 collectively. All queries raised by FIBUCA were fully addressed by the Respondent Management and that the final meeting was conducted on 26th January, 2018 (Exhibit D8).

Mr. Kamala went on submitting that to the contrary, the Applicants resurfaced with another survey to sensitize the staffs to start afresh the process of giving opinion. That worse enough, the Applicants were biased and issued a format which excluded other selected tenderers and in some instances the Applicants issued a format which included three, two and

sometimes 1 provider who are; AAR Insurance Tanzania Limited, National Health Insurance Fund and Strategies Insurance Tanzania Ltd. He argued that in the format, they left Jubilee Insurance and in other occasions left aside Jubilee Insurance and no reason whatsoever was given to that effect. He referred to the testimony of DW2 who produced Exhibit D19; some correspondence of emails from the applicants to different staffs of the Respondent who are scattered all over the country. That this evidence was supported by Nyange Chipamba DW3 (page 53-54), Elisangua Shayo DW4 (pg 56-57), Godfrey Nyakwesi DW5 (pg 57-58), Veronica Chenza DW6 (pg 59) and Gaddaf Nasir Malena DW7 (pg 60-61). He emphasized that all these witnesses testified to the effect that they received the phone calls and emails from the Applicants insisting them to provide their opinion but their preference should be Strategies Insurance. He emphasized that Exhibit D19 establishes extensively how the Applicants solicited opinion from workers while the process to collect opinion was already closed and the Applicants were fully aware. Giving an example of the email from Abdalla Kinenekejo to Gift dated 27th January, 2018 contains an attachment which show only three service providers and the email was that:

"MAONI YA WAFANYAKAZI-TAWI LA HOROHORO

Nakuomba nikusanyie maoni ya wafanyakazi kuhusu matibabu kama wanapenda kubaki strategy au wanataka NHIF mfano ni huu niliouambatanisha hapo .

Kinenekejo"

He submitted further that again in the email dated 27th January, 2018, Abdallah Kinenekejo sent an email to Thomas Assey informing him the criteria to be used and he wrote:

"Subject: RE: MAONI YA WAFANYAKAZI –TAWI LA KIHOROHORO

Vigezo vilivyotumika

1. Reliability of service

2. ***Quality of service rendered using past experience***

3.Timely/Quick service to clients as..."

His argument is that these criteria were obviously biased and intended to make preference to a single competitor because criteria No.2 could only be achieved by Strategies Insurance only because other competitors had never offered service to the Respondent. That during cross-examination, PW1 testified that indeed the criteria imposed were not fair to the rest of competitors and this was nothing than abuse of office by

Applicants using their capacities as FIBUCA representatives to inflict their personal interests to other staffs.

In rejoinder, Mr. Mnyele first argued that at no material time were the applicants charged with the disciplinary offence of interfering with procurement procedure of the health provider. The disciplinary offenses charged were abuse of office and violation of communication policy. So, what has been insinuated in an opening paragraph should be disregarded completely as it's misleading. He then made a reply to Mr. Kamala's citation of the minutes of the 26th January, 2018 to show that there was some consensus in the said meeting of which the applicants breached. His rejoinder submission was that the minutes reflect the view of the Management and were prepared as such. The meetings were jointly chaired by a member of the management and the workers representative from FIBUCA (Katasso Magesa) who did not append his signature in the said minute. That the correct version of what transpired is described by PW1 from page 69 of the proceedings up to page 70 and that the said meeting ended in acrimony due to unwarranted intervention of the CEO. Had it ended well, the minutes could reflect that and there would be resolution to that effect. That is why the author of the minutes has just

remarked *"the meeting came to an end".* That in Exhibit D4 from page 22-33 of the record, it shows that the meeting ended with a clear resolution and consensus therefore that consultation process did not come to an end, and as testified, the trade union had a right to follow up and consult their people so as to solicit their view on the best service provider as the consultation was not closed as alleged by the respondent.

On the issue of abuse of office, Mr. Mnyele argued that apart from being ordinary employees of the respondent, the applicants were leaders in the trade union. So they had two "offices" with distinct functions and that they were not charged in their capacity as employees of the respondent. That as a matter of fact nothing had been brought to prove that as employees of the respondent they committed any disciplinary offence and that here is nothing like an abuse of office with regard to their position as officers of the Bank.

My work here is to see whether the conduct of the applicants in relation to the ongoing procurement process has some elements of biasness and solicitation as alleged by the respondent, it is also to see whether the offence of misconduct related to abuse of office in relation to identification and selection of Medical Service Provider was proved.

According to the applicants, they were performing their duty as representations of their trade union FIBUCA while the respondent alleged that the applicants abused their office by an unlawful influence/solicitation. The issue is whether the act of the applicants to seek opinion from staff breached the company policy. According to the respondents the applicants solicited the opinion even after the time to do so had lapsed hence it has to be made clear at this point that at the initial stage of the procurement process.

It is undisputed that the Respondent involved the workers' trade union known as FIBUCA to represent the interests of employees in the selection process (Exhibit D6), and reasons why the Management preferred selective source approach. The involvement of the applicant as leaders of trade union was done as per the Exhibit P1 and P2, several agreements between the respondent and the Trade union FIBUCA. On that note, it is pertinent to note that the dispute at hand is based on the timing between which the applicants were lawfully involved by the respondent and the alleged involvement of the applicant after the negotiations were closed.

First of all I have visited EXD4, a consultative meeting between the management and FIBUCA held on 25th January, 2018 at NMB Head Office.

In the minutes of that meeting, it is clear that FIBUCA raised several concerns and taking into account of sensitivity of the matter, it is reflected on page 10 of the minutes that management agreed to invite NHIF on 26/01/2018 for presentation and responding to the concerns of FIBUCA. It is further reflected in the minutes that FIBUCA had a different view because they wanted all vendors to do presentation unless management had already made final decision of awarding tender to NHIF. This was as per the information they had from different sources. Further that the MD's letter is very clear in that all vendors were to be invited for presentation, something which was not done. This is when it was agreed that the three providers NHIF, AAR and Strategis will be invited the next day 26th January, 2018.

I must point out that at this point, I see that if there was a problem then the tender Board was also one of it. As reflected in the minutes, one will ask himself as to why did the management insisted that only NHIF should be invited in the process and not the three providers, something which unfortunately, was against even the MD's letter (as per the minutes-EXD4). Again, contrary to what Mr. Kamala had submitted about the applicants only mentioning three service providers to the employees calling

it a bias, the minutes reflects that by the time they were having a meeting on 25/01/2018, the Tender Board had already narrowed down only three providers which were to be called for presentation on 26/01/2018. Again, in the meeting held on 26/01/2018, no such presentations were made but instead, it appears to me that it was an ultimatum meeting where in answering the union question on whether the management had made some decisions on the service provider despite the process, the management made draconic reply that it reiterated its view. That the legal structure had no service bearing on the service provided on whether the provider is an insurance company or a social security scheme and that what matters is the quality of service. The management even questioned how NHIF's legal structure impact on the medical service for an employee at Kakonko, while making their decision, in the same minutes of the meeting it is noted that:

> *"Management emphasizes that all issues will be properly dealt with by the Bank's Legal department. All concerns should be noted and forwarded to legal department and tender committee. Lawyers and committee will make due diligence to ensure there is a neutral agreement to address all legal and service issues."*

At this point, Union asked if management needed more inputs and Management thanked union for their contribution and that they will be taken into consideration and that for Management, choosing the right medical provider is of utmost importance. The negotiations definitely ended at this point (EXD9). Therefore, should there have been any grievances on the part of the employees through FIBUCA, then appropriate measures should have taken through the management, but what happened then that got to this point?

The question above is answered by looking at EXD19, EXD11 and EXD12. Starting with the EXD19, after the closure of the meeting, the applicants still went ahead on 26/01/2018, 28/01/2018 and 29/01/2018, and made some communications to the employees on their choice of medical service provider. Some of the emails are as cited by Mr. Kamala, for instance the email from Abdalla Kinenekejo to Gift dated 27th January, 2018 contained an attachment which show only three service providers and the email was that:

"MAONI YA WAFANYAKAZI-TAWI LA HOROHORO

Nakuomba nikusanyie maoni ya wafanyakazi kuhusu matibabu kama wanapenda kubaki strategy au wanataka NHIF mfano ni huu niliouambatanisha hapo .

Kinenekejo"

Also looking at the email dated 27th January, 2018 from the same Abdallah Kinenekejo to Thomas Assey informing him the criteria to be used and he wrote:

"Subject: RE: MAONI YA WAFANYAKAZI –TAWI LA KIHOROHORO

Vigezo vilivyotumika

1. Reliability of service

2. ***Quality of service rendered using past experience***

3.Timely/Quick service to clients as..."

As correctly argued, the criteria expressed above may be construed as biased and intended to make preference to a single competitor because criteria of using past experience could only be achieved by the provider who had worked with the respondent before who is Strategies Insurance. It may be biased because the other competitors had never offered service to the Respondent.

Further to the above, I am alive of the fact that one of the roles of the trade unions at work place is to providing assistance and services to their members, collectively bargaining for better pay and conditions for all workers, and this is why they were involved in the process of procurement because provision of medical insurance is a crucial part of the employee's wellbeing. Under Section 60(3) of the ELRA, the employer is imposed with a duty to provide union reasonable and necessary facilities to conduct its activities at the workplace. However, the rights of a Trade Union above is subject to any conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent undue disruption of work. Therefore although trade unions look after the interests of their members, they also recognize the advantages of working in partnership with employers in order to provide harmonious work environment and preventing workplace conflicts.

Having that in mind, looking at the EXD19, the communication may be construed as sort of a campaign to mobilise the employees in choosing a provider, their preference being the previous provider. This communication was not authorized since the process of procurement which involved the applicants ended on the 26th January, 2018 via EXD9.

Further to the above, during arbitration, the Applicants denied to have been involved in conducting the survey. However, the denial was countered by the evidence adduced by the respondent which was showed the denial was contrary to their own admission in Exhibit D12 and D16 where they clearly admitted to have conducted the survey post the closure of the process.

Further to that, in their defence, the applicants allege that they did the survey because of instructions from the Secretary General of FIBUCA, but on cross examination of PW1, they could not tender the written instructions from the secretary general or any resolution sanctioning conduct of survey after the closure of the process on the 26/01/2018. This was also supported by the evidence of DW3-DW7 which was corroborated by EXD11 whereby one of the applicants admitted to have made a call to the employees and mentioned two and not four providers, his defence being the two providers were the most powerful in providing Health service to employees. There was also Exhibits D12, Charge sheet and Admissions of the applicant to have issued a format which contained 3 providers and EXD16 whereas the Applicants seem to have admitted in writing that they

conducted the survey and collection of opinion, on defence that they had been instructed by Secretary General of FIBUCA.

In recognition that under Rule 8 (1)(c)&(d) of the Code provides for fairness as a yardstick in termination of employment with regard to reason and procedure and Rule 9(3) of the same Code makes it sufficient for the employer to prove the fairness of the reason on balance of probabilities. From what I have analysed above of the evidence that was adduced during arbitration, in line with Rule 9(3) of the Code, the employer/respondent successfully proved the offences of abuse of office and violations of bank's communication policy by using the employer's facilities without authorization from management. The substantive reason of termination was therefore fair.

Coming to the procedural part, I will start with Mr. Mnyele's argument that apart from being ordinary employees of the respondent, the applicants were leaders in the trade union and that they had two "offices" with distinct functions and that they were not charged in their capacity as employees of the respondent. That nothing had been brought to prove that as employees of the respondent they committed any disciplinary offence and that here is nothing like an abuse of office with regard to their position

as officers of the Bank. I have gone through the charge sheets and the hearing form and contrary to what Mr. Mnyele would want the court to believe, none of the applicants was charged as a member of a Trade Union. They were charged as employees of the respondent. I find it important to remind Mr. Mnyele with respect that the role of the applicants as leaders of the trade union FIBUCA ended on the 26th January, 2018 when the consultations were marked as closed. Therefore anything done by them beyond that was unfortunately, done by the applicants as employees and that is why they were as such charged.

Coming back to the procedures deployed by the respondent during termination, I have gone through the procedures deployed during the process of termination of the applicants. The Applicants' argument is that the Respondent was supposed to prove the charge of each Applicant separately. However, as correctly pointed out by Mr. Kamala, the evidence brought at the CMA by DW1-DW7 proved the offence to each individual Applicant. DW1 tendered documentary evidence concerning each individual and the Respondent tendered Exhibits D12 and D16 which contains admissions of each Applicant to have participated in collection of opinion after the Respondent had closed the exercise. During the said disciplinary

hearing, each individual case was proved on the balance of probabilities as required by law.

There is also evidence of the charge sheet, sufficient time was provided and the hearing afforded the applicants opportunity to be heard. The applicants were also accorded an opportunity to appeal therefore the procedure under Rule 13 of the Code was adhered to. I therefore see no reason to fault the holding of the CMA that the termination was procedurally fair.

In the upshot and on the above findings, this application has no merits and it is hereby dismissed.

Dated at Dar es Salaam this 28th day of March, 2022

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S.M. MAGHIMBI
JUDGE