

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 476 OF 2020**

**BETWEEN**

**TPB BANK PLC.....APPLICANT**

**VERSUS**

**AHOBOKILE MWANJOKA..... RESPONDENT**

**JUDGMENT**

**S.M. MAGHIMBI, J:**

The applicant employed the respondent in August, 1995 as a Bank Clerk. The Respondent was later promoted to the position of Senior Manager Bank Operations. On 17<sup>th</sup> June, 2016 the Respondent was charged with Two (2) Counts of removing a restriction hold in a customer account, the act which allegedly caused loss to the applicant and acting in situation where he had a conflict of interest. The Applicant conducted a Disciplinary Hearing and the Respondent was given a chance to be heard and after hearing on 11<sup>th</sup> July, 2016 the Respondent was terminated from Employment on Grounds of Gross Misconduct. Aggrieved by the termination, the respondent successfully lodged a Labor Dispute No. CMA/DSM/ILA/R.729/16/813 ("the Dispute") before the Commission for Mediation and Arbitration for Ilala ("the CMA"). The applicant was not

amused by the award of the CMA and lodged this revision under the provisions of Section 91(1)(a),(b) 91(2) (b) and (c), 94(1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004, as amended by section 14 of the Miscellaneous Amendment Act No. 3 of 2010, Rule (1), 24(2), (a),(b),(c),(d),(e),(f) and 24(3)(a),(b),(c) and 24(11), Rule 28(1)(c),(d) and (e) of the Labour Courts Rules, Government Notice No. 106/2007.

The Chamber Summons was supported by an Affidavit sworn by Emmanuel G. Mwakyembe, Advocate for the Applicant dated 24<sup>th</sup> September, 2020. In her application, the applicant raised the following grounds;

- (i) That the Learned Arbitrator Erred in law and fact for awarding in favour of the Respondent without considering the evidence and arguments adduced by the Applicant that the Applicant did not prove that the reason for termination amounts to Gross Misconduct.
- (ii) That the Learned Arbitrator erred in law and fact for deciding that the Termination was not fair as the Applicant failed to produce Staff Regulations before the Commission.

(iii) That the learned Arbitrator erred in fact and law by delivering illogical and improper Award.

Before this this court, the applicant was represented by Mr. Emanuel Mwakyembe, learned advocate while the respondent was represented by Mr. Adam Mwambene, learned advocate. The application was disposed by way of written submissions.

Starting with the 1<sup>st</sup> ground of Revision, Mr. Mwakyembe submitted that during hearing at the CMA, the Applicant managed to prove the Reason as to why the Respondent was terminated by using three witnesses which were marked as DW1, DW2 and DW3 by the CMA. That in the Award, the Arbitrator stated that the Applicant failed to prove that the reason for Termination amounts to Gross Misconduct. He elaborated that the Respondent was terminated after he was found guilty for the act of removing a restriction hold in a customer account, the act which caused loss to the Applicant as a financial institution.

Mr. Mwakyembe submitted further that at the Commission, the Applicant proved that the Respondent removed a restriction hold in a customer account the act which enabled the customer to withdraw the money which the Applicant restricted. Further that the Applicant managed

to prove that during investigation it was discovered that the account which was edited was the loan account of one Upendo Jacob Kabisa who is the wife of the Respondent. That to prove this, the applicant used the testimony of the person who investigated the Respondent allegations **DW2 Mr Sostenes Florian Nyenyembe**, the Director of Internal Audit at Tanzania Postal Bank. To prove that the Respondent removed a restriction hold in his wife account, he tendered a snap shot which was marked as Exhibit D8, a Customer Bank Statement was marked as Exhibit D9 and a marriage certificate to prove that the account belonged to the Respondent wife was marked as Exhibit D10.

He went on submitting that the Applicant managed to prove that the act of removing a restriction hold in a customer account by the Respondent amounts to Gross Misconduct through another witness DW1 Mr. Damas Seseja a Chief Manager Human Resources at the Bank. That DW1 testified that the Respondent act to remove a restriction hold was against the Banking Regulations and it caused loss to the Bank and that DW2 explained that after the Respondent Removed the Restriction Hold, the Customer managed to withdraw Tshs.1,490,000/=. Further that the Applicant managed to Prove through **DW3 Salma Juma Marijani**, a

Branch Manager at YWCA Branch, that the Respondent act was also a conflict of interest as the account which he edited belonged to his wife and the Respondent was a Guarantor (Exhibit D14). That it was further proved the Respondent removed the restriction hold without approval or authorization of the Branch Manager who put the restriction, she explained that she was the one who disbursed the loan to the Respondent's wife and that she was the one who put hold in the Respondent's wife account and that she never allowed the Respondent to remove the restriction hold in the customer account.

It is the Applicant's submissions that basing on the nature of the Applicant's business, the Respondent's act amounts to Gross Misconduct as it was proved that it caused loss to the Bank. It was an act of dishonesty and a conflict of interest as the Respondent was a guarantor to the loan secured by his wife and he went on to remove the hold without permission. That dishonesty itself is a misconduct which justifies Termination, supporting his argument by citing the case of **G4 Security Services (T) Ltd Vs. Peter Mwakipesile, Lab Div. Dsm, Revision No.109/2011, 10/7/12, [2013] LCCD No.68, where Rweyemamu, J** (as she then was) held:

*“the Arbitrators conclusion that termination was unfair in light evidence of undisputed dishonesty on the part of the employee was unreasonable and contrary to law. It is not a rational conclusion to state even generally that honesty is not a requisite part of a contract of employment in law, dishonesty is a misconduct which is severe enough to justify termination”*

Mr. Mwakyembe submitted further that the Act of Gross Dishonest under the Code of Good Practice (G.N No.42 of 2007) Rule 12(3) (a) contains/provides for the acts of misconduct which may justify Termination, the Rule provides that Gross Dishonesty may result into Termination. That according to the provision of the law, the Respondent was found guilty of the act which justifies the Applicants reason for termination. That the Respondent failed to act in good faith to the Applicant which is a primary duty to all staffs of the Bank, he supported this submission by citing the case of **Vedastus .S. Ntulanyenka & 6 Others Vs Mohamed Trans.Ltd. Revision No.4/2014 (Unreported)** which held that:

*“the Code of Good Practice Rules GN. NO.42 OF 2007 does contain a number of guidelines in cases of termination for misconduct under Rule 12 (3) of the Code of Good Practice Rules No.42/2007.”*

On the second ground of Revision, Mr. Mwakyembe faults the Learned Arbitrator for deciding that the Termination was not fair as the Applicant failed to produce Staff Regulations before the Commission. He cited the holding of the CMA at page 14 the last paragraph of the award where the learned Arbitrator stated that:

*'pamoja na kuwa, hakuna ushahidi wa mlalamikaji kuruhusiwa kuondoa zuio, lakini pia mlalamikiwa hakuweza kuithibitishia Tume ni adhabu gani inayotolewa kwa mujibu wa kanuni zinazosimamia wafanyakazi (staff Regulation) na kwamba kanuni hizo hazikuwahi kutolewa mbele ya Tume hii."*

Mr. Mwakyembe then argued that the act of the Respondent amounts to dishonesty which according to the Code of Good Practices Rules GN.NO.42 of 2007, Rule 12(3)(a) it justifies termination. That the Respondent admitted to the charge of removing a restriction hold to allow his wife to withdraw the amount which were restricted by the Applicant through his written statement Exhibit D12, he used his position to enter into a Banking system to remove a restriction hold without permission.

The Applicant submitted further that before hearing, only two issues were framed for consideration, (i) whether procedures were followed in

termination of the complainant (ii) Reliefs. The Learned Arbitrator in the award added issue No 3 which were not drafted by the parties but in the CMA award page 3 paragraph 3 issue number one was included by the learned Arbitrator suo motto hence the Applicant was not given a chance to defend on that issue and that is the reason a staff regulation was not tendered even though it was attached in the list of Document filed in the Commission.

He argued that Rule 12 of the Employment and Labour Relations [Code of Good Practice] Rules 2007 GN.No.42 of 2007 provides for the sources of rules regulating the conduct of the workers at work place, Rule 12(1)(a) provides that the sources of the rules may be from (i) the Disciplinary Code[written Disciplinary Code] (ii) from legislation rather than from unilateral decision of the Employer (iii) from the contract of Employment or in a policy or personal manual and even on notice boards in work place. He supported this argument by citing the case of **National Microfinance Bank Plc V. Aizack Mwampulule, [2013]LCCD 70, Mipawa, J where** it was held that:

*"another important source of rules regulating the conduct of workers at work place is common law source. In common law the*



*employees must act in good faith towards the employer. An employee who is guilty of misconduct breaches the common law duty to act in good faith towards the employer"*

He then submitted that the fact that the Applicant failed to produce a staff regulation at the CMA does not mean that the Applicant was terminated unfairly and that the learned Arbitrator failed to consider the fact that even if a certain rule is not covered in the Employers disciplinary Code does not prevent the Employer from acting against the employee who has committed a misconduct, supporting this submission by citing the case of **National Microfinance Bank Plc Vs Aizack Mwampulule**, Supra.

He submitted further that the learned arbitrator was wrong to award in favor of the Respondent simply on grounds that the Applicant failed to tender a Staff Regulation, the Respondent breached an important rule, he was supposed to act in good faith with honesty towards the Applicant, but he failed to act in such manner which is a serious misconduct as per the decision and authorities we have cited above.

**Mr. Mwakyembe based his submission on the** last ground that the learned Arbitrator erred in fact and law by delivering illogical and

improper Award, by reiterating on the arguments and facts analyzed above, arguing that the arbitrator's failure to consider that the Respondent act of dishonesty by itself is a serious misconduct which can result into termination without even being covered in the Employers Rules is an error. He cited the case of **National Microfinance Bank Vs Andrew Aloyce. [2013] LCCD 84**, whereby Hon. Rweyemamu, J. (as she then was) emphasized that\_in deciding the gravity of a particular Misconduct, one has to bear in mind the type of the employer business and the importance of honesty in the said business. That the arbitrator failed to consider the Nature of the Applicants Business, the Respondent caused loss by removing the restriction hold and it was a conflict of interest, the Respondent put his personal interests against the interest of his employer (Applicant).

In conclusion, Mr. Mwakyembe called upon this Honorable court to go through the CMA proceedings and make a fair decision that the Reason for Termination was valid as the Respondent breached his primary duty to act in good faith and the Code of Good Practice (G.N No.42 of 2007) Rule 12(3)(a) clearly provides that the acts of gross dishonesty result into Termination.

In reply, the respondent submitted that

I have considered the grounds of revision, the parties' submissions for and against the revision and the records of the CMA and I find that the applicant is moving the court to revisit the records of the CMA to see whether the termination of the applicant was substantively fair. As per the records, on page 15 of the award, the arbitrator was satisfied that the applicant proved the gross misconduct committed by the applicant, so she wrote:

*"Katika shauri hili hakuna mashaka kuwa mlalamikaji ametenda kosa la kukiuka kanuni za utumishi lakini bahati ni mbaya kuwa adhabu inayotolewa kwa kosa hilo haikuthibitika mbele ya tume hii na hivyo kulazimika kurejea kwenye kaninu za utendaji bora..."*

Having satisfied himself of the misconduct alleged, the arbitrator took the respondent off the hook on reasoning that the applicant did not bring the Human Resource Manual to show the corresponding punishment on the misconduct. This is reflected in the page 14 the last paragraph of the award where the learned Arbitrator stated that:

*'pamoja na kuwa, hakuna ushahidi wa mlalamikaji kuruhusiwa kuondoa zuio, lakini pia mlalamikiwa hakuweza kuithibitishia Tume*

*ni adhabu gani inayotolewa kwa mujibu wa kanuni zinazosimamia wafanyakazi (staff Regulation) na kwamba kanuni hizo hazikuwahi kutolewa mbele ya Tume hii.”*

The question is whether it was proper, after having found that the respondent committed gross misconduct, it was proper to let the respondent off the hook by mere reason that the staff regulations were not produced during arbitration. The arbitrator should have instead resorted to the available legislations on the issue of gross misconduct. This is found in Rule 12(1) & (3) (a) of the Code of Good Practice which provides:

*"12.-(1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider-*

*(a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;*

*(b) if the rule or standard that was contravened, whether or not-*

*(i) it is reasonable;*

*(ii) it is clear and unambiguous;*

*the employee was aware of it, or could reasonably be expected to have been aware of it;*

*(iv) it has been consistently applied by the employer; and*

*(iv) Termination is an appropriate sanction for contravening it."*

Since it was not disputed that the respondent was aware of the rule, and that it is clear and unambiguous, then the applicant is also guided under the umbrella of Rule 12(3)(a) of the same Code which provides:

*"(3) The acts which may justify termination are-*

*( a) gross dishonesty;"*

Since the code is clear that gross dishonesty may justify termination, the arbitrator was only duty bound to analyse whether the respondent conducted the dishonesty. As per the records, indeed the arbitrator was satisfied to that effect as he made that finding in his award. It is not clear as to why, having so found that the gross dishonesty was proved, he was not guided by Rule 12(3)(a) of the Code and make a finding that the termination was the appropriate sanction.

Further to the above, as held in the case of **National Microfinance Bank Vs Andrew Aloyce** cited above, the court should also consider the kind of business that the employer is engaged in. In this case the employer is in financial business, a very high risk financial industry and if the employee conducts such a gross misconduct including dishonesty and acting on conflict of interest, we cannot expect to have the employer

continue to employ the same person, he should be taken out of that business. Therefore the sanction taken by the applicant was the proper one under the circumstances. On those observations, it is to the satisfaction of this court that the substantive reason for the respondent's termination was fair. Since the procedures for termination of the respondent was found to be fair and it is not challenged before me, it is conclusive that the termination of the respondent was fair both substantively and procedurally. On those findings hence, I allow this revision for having merits. The award of the CMA is set aside, the termination of the respondent was fair hence he is not entitled to any relief of unfair termination under the Act.

Dated at Dar es Salaam this 09<sup>th</sup> day of March, 2022.



  
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**S.M. MAGHIMBI**  
**JUDGE**