IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 141 OF 2021

BETWEEN

NMB BANK PLC.....APPLICANT

VERSUS

MARTIN PETER MOSHA.....RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Ilala) (Msina: Arbitrator) dated 31th day of March, 2020 in Labour Dispute No. CMA/DSM/ILA/215/19/142)

JUDGEMENT

13th June 2022 & 30th June 2022

K. T. R. MTEULE, J.

This Revision application emanates from the ruling of the Commission for Mediation and Arbitration (CMA) asking for this court to call for the records of Labour Dispute No. CMA/DSM/ILA/215/19/142 Ilala, Dar es Salaam, revise and set aside the award therein. The Applicant **NMB BANK PLC**, is praying for the orders of the Court in the following terms:-

1. That the Honorable Court be pleased to call for the records and examine the proceedings of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/ILA/215/19/142 delivered on 31st March 2021 by Honorable Msina, H.H, the

arbitrator, in view of satisfying itself as to the legality, propriety and correctness thereof.

2. That the Honorable Court be pleased to revise and set aside the Commission for Mediation and Arbitration (CMA) Award in Labour Dispute No. CMA/DSM/ILA/215/19/142 delivered on 31st March 2021 before Hon. Msina H. H, for being illegal, improper, irrational and incorrect.

The background facts of the matter leading to this application is extracted from the CMA record, affidavit and counter affidavit filed by the parties as hereunder narrated. The respondent was employed by the applicant in the capacity of Head of Credit. Their relationship changed on 12th March 2019 when the applicant's employment was terminated for an alleged misconduct (gross misconduct). Aggrieved by the termination, the Respondent filed the aforementioned labour dispute in the CMA on 19th March 2019 claiming for unfair termination and praying for reinstatement. In the CMA, the termination was alleged to have been exercised by the employer without a valid reason and proper procedure. The CMA decided in respondent's favor, which aggrieved the Applicant who lodged this application for revision to challenge the award.

The applicant advanced five legal issues of revision as stated at paragraph 7 of her affidavit. The issues the following:-

i) The trial Arbitrator demonstrated ostensible biasness against the applicant during the trial by declining to admit Annexure E-9 which the respondent admitted under oath to have been authored by him; while on the same ground the Arbitrator admitted Exhibit AP-1B in favour of the respondent which was of the same nature and circumstances.

ii) The trial Arbitrator demonstrated ostensible biasness against the applicant during the trial by declining to admit Annexure E-13 the document which was vital to the determination of the dispute; even after applicant's witness demonstrated the grounds for its admission. This is evidence in writing of Zebedeyo Mgini whose evidence implicated the respondent's impersonation in the Credit Analysis Report. Zebedeyo Mgini by design resigned a day before he was required to give evidence at the Commission for Mediation and Arbitration whose resignation was directly related to disort the applicant defence.

iii) That the trial arbitrator erred in law and fact by holding that the applicant had no valid reason to terminate the respondent while there was ample evidence to the contrary.

iv) The trial arbitrator erred in law by holding that the procedure of terminating the respondent was not followed.

v) The arbitrator erred in law by holding and fact by failing to evaluate the evidence tendered before her which strongly proved the valid reasons to terminate the respondent.

The application was argued by written submissions. The applicant was represented by Pascal Kamala, Advocate while the respondent was represented, by Mr. Daniel Welwel, Advocate.

Arguing regarding double standard and biasness of the arbitrator, Mr. Kamala complained against the arbitrator's refusal to admit exhibits. He stated that the arbitrator rejected the admission of applicant's exhibits even in the circumstances where the witness who was tendering it was the author of the document who tendered it under oath and bearing his signature. Mr. Kamala insisted on arbitrator's biasness for admitting the respondent's exhibits.

Mr. Kamala made another complaint against the arbitrator alleging her to have not recorded the evidence on cross examination when the Counsel for the applicant examined the respondent on Annexure E-9 (respondent's statement during investigation), in which the respondent is said to have agreed to know it with his signature therein. According to Mr. Kamala, the biasness is further reflected in the reply to the objection against the Counsel for the Applicant referred to in evidence of the respondent as stated at page 112 at the last paragraph of the proceedings. Supporting his submission, Mr. Kamala cited the case of **DPP v. Mirzai Pirkbaksh@ Hadji & 3 others,** Criminal Appeal No. 493 of 2016.

On the second issue, Mr. Kamala challenged the arbitrator's refusal to allow DW4 to tender a document sought to be tendered. On the reason that he had no powers to do so. According to Mr. Kamala, DW4 was the custodian of the said document hence he was a competent witness to tender it. He referred this Court to the case of ***DDP's vs. Mizrai (supra).***

Regarding validity and fairness of reason for termination Mr. Kamala referred to the evidence of DW1, Exhibit D1 and Exhibit D15 (Disciplinary Charge sheet) which in his view, categorically elaborates

the disciplinary action against the respondent and subsequent termination of his employment. According to the Mr. Kamala's submission, the disciplinary charges which faced the Respondent included an act of concealment of information with intent to mislead the Bank, abuse of authority by ignoring professional advice and infringement of Bank procedures of credit assessment approval. Making further reference to Exhibit D1, he stated that the Credit Application can move from the Credit Analyst and be reviewed by Head of Credit through stages and not otherwise but during the disciplinary hearing the respondent admitted having infringed the procedure by making changes to the Credit Application which was declined by Credit Analyst namely Zebedeyo without his consent (He referred to Exhibit D18 at page 6 (Disciplinary Hearing Form). The alleged changes had effect of concealing a bad history of a company which was the basis of credit analyst denial to endorse the credit application. On such basis he is of the view that the respondent's action was nothing than impersonation and falsification since he ignored the advise of credit analyst which amounts to abuse of authority.

Mr. Kamara challenged the basis of the arbitrator's reason that there was no investigation report, which lead to the CMA holding that there was no valid reason for termination. He claimed that investigation was conducted but it was not mandatory to be produced in the disciplinary meeting and not even the decision of the disciplinary committee was based on the investigation report.

While acknowledging the mandatory requirement of conducting investigation under Rule 13 (1) of the Code of Good Practice, GN. No. 42 so as to ascertain whether there are grounds for a hearing to be held Mr. Kamara asserts that there is no legal requirement to supply the said investigation report to the employee. Strengthening his argument, he cited the case of **Tanzania Cigarette Company Limited v. Ovadius Mwanagamila and 2 Others,** Labour Revision No. 334 of 2020, (unreported). He is of further view that the arbitrator erred in law by holding that the respondent was found guilty with respect of an investigation report which was not tendered without considering other evidence in making decisions. He further added that the core value of banking industry is integrity, trust and confidence and therefore, the respondent's act was not honest because there was a red alert, which he ignored. In his view, being in

Managerial cadre, the respondent's act amounted to gross violation of the bank policies. Supporting his stand, he cited range of cases including the case of **National Microfinance Bank (NMB) v. David Bernard Haule,** at Sumbawanga (LCCD) 2014 at page 256.

It is further submission of Mr. Kamala that the respondent's acts of abusing his position and ignoring the legal opinion issued by legal department, while aware of the fact that the Credit Applicant had presented forged collateral is contrary to Rule 12 (4) (a) of GN. No. 42 of 2007, which attract termination as a proper sanction. He is therefore of the view that the Applicant had valid reason to terminate the Respondent's employment.

On procedural aspect, Mr. Kamala submitted that the arbitrator erred in law by holding that the procedure of terminating the respondent was not followed in absence of investigation report. According to his submissions, the respondent was charged with the offences due to violation of applicant's policies. He reiterated that there was no mandatory requirement to produce the investigation report before the commission.

Submitting in the alternative, while assuming there to be a minor error in the procedure, Mr. Kamara is of the view that minor error in initiating disciplinary hearing could not vitiate the whole procedure. Supporting the stand, he cited the case of **Deus Wambura v. Mtibwa Sugar Estate Ltd.**, Revision No. 3 of 2014. They thus prayed for the application to be allowed, the CMA award be quashed and set aside.

Disputing the application Mr. Welwel, Advocate considered the issue of biasness and double standard on admission of evidence and documents including Annexure 9 and 13 at this stage as an afterthought. In his view, this claim was supposed to be raised at the CMA. Supporting his submission, he cited different cases including the case of **Standard Chartered Bank (Hong Kong) Ltd. v. VIP Engineering and Marketing Ltd.**; Civil Application No. 158 & 159 of 2011, Court of Appeal of Tanzania, at Dar es Salaam (unreported). Regarding reason for termination, Mr. Welwel argued that the duty to prove in case of unfair termination lies to the employer as per **Section 39 of the Employment and Labour Relation Act, Cap 366 R.E 2019** and **Rule 12 of the Employment and Labour Relations (Code of Good Practices) GN. 42 of 2007**. He

challenged failure of the Applicant to produce the investigation report before Commission, thus misconduct was not proved.

On abuse of office arising from the allegation of ignoring professional advice, Mr. Welwel submitted that this claim is baseless on the ground that the respondent had no decision-making role but was a merely conduit pipe for passing the document from authorizing department to the credit committee.

Regarding procedural aspect, Mr. Welwel maintained that the applicant did not follow any fair procedure in terminating the respondent. He averred that investigation process and resultant report have twin objectives; Firstly, being ascertaining as to whether grounds exist for initiating disciplinary hearing and secondly, to enable employee in his or her defence. He argued that since Dw-4 confirmed HR department to have used the investigation report to frame charge without having it given to the respondent nor tendered at CMA, then there was no fair hearing and that the principles of natural justice were not observed.

In rejoinder applicant reiterated his submission in chief but emphasized that non production of investigation report does not alter

other evidence produced during the trial which proved that the respondent was guilty of the disciplinary offences he was charged with. Thus, they prayed for the application to be allowed.

From the parties' argument, this Court is obliged to determine two issues which are; ***whether applicant adduce justifiable grounds/reasons for this Court to exercise its revision power?*** and ***to what reliefs parties entitled to?***

In answering the above issues, I will address the issues raised in the affidavit seriatim. I find worth to address the issues of biasness and double standard regarding admission of evidence which constitute the 1st and the 1st legal issues of the affidavit. It is not disputed that these issues feature for the first time at this revisional stage. It is further not disputed that no particulars of biasness and double standard were given on oath through the Applicant's affidavit apart from just mentioning it as legal issues.

Starting with record impeachment, I concur with the Respondent's Counsel and the cited cases on this issue. Impeachment of court record cannot be taken so lightly in justice administration. **(See Paulo Osinya versus Republic, [1959] 1 EA 353. Also cited by the Respondent).** Record alterations attracts disciplinary actions

against the responsible officer. If the arbitrator did a deliberate act to make false recording, this should have been an evil to be urgently treated by raising it to the arbitrator to take self-step to correct or, and including asking for recusal from the matter. In my view, serious matters like this need to be addressed by evidence something which cannot be honored at revisional stage other than trial Court. The same applies to the allegation of biasness and double standard. The sanctity of court record, and procedure requires an immediate response when the record and the independence of the process is tempered with. Since biasness and double standard together with record temperament come at this stage for the first time, I am of the view that the same cannot stand to vitiate the proceedings and the award of the CMA. They are considered to be an afterthought. Therefore, the first and the second issues of affidavit lacks legal stance.

Having found the 1st and the 2nd issues of affidavit not confirmed to support the revision then what follows is the fairness of the termination. Termination is considered to be fair if it complies with **Section 37 of the Employment and Labour Relation Act, Cap**

366 R.E 2019 which provides:-

"Section 37 (2) A termination of employment by an employer is unfair if the employer fails to prove:-

(a) that the reason for the termination is valid;

(b) that the reason is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer."

I borrow leaf from the decision of this court in **Tanzania Revenue Authority V. Andrew Mapunda,** Labour Rev. No. 104 of 2014 where it was held it:-

"(i) It is the established principle that for the termination of employment to be considered fair it should be based on valid reasons and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment, Section 37 (2) of the Act.

(ii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."

The respondent was terminated for an alleged gross misconduct of not acting in good faith and dishonest as indicated in Exhibit AP3 (termination letter) collectively. This fact is disputed by the Respondent who successfully pleaded unfair reason of termination before the CMA. Although the Respondent was charged with 3 disciplinary offences, the Disciplinary Committee found him guilty with one offence namely gross misconduct for *"concealing information with an intent to mislead the Bank by instructing the credit analyst to remove bad credit history of the credit applicant of the letter of credit facility from credit application (CA) while knowing that it was important aspect for consideration for further decision by the credit committee."* (See Exhibit D18 which is the finding of the Disciplinary committee). The arbitrator found that the Respondent did not have an intent to conceal the information, and would it be so, he should not have been acquitted from the first offence.

In my view the question before this Court is whether the Respondent was involved with the act of concealment of information with intent to mislead the Bank and if so, whether it amounts to gross misconduct which should be penalized by termination of employment.

The applicant contends that the respondent committed misconduct for concealing information with an intent to mislead the bank by instructing the credit analyst to remove bad credit history of the applicant from the letter of Credit facility in the credit application.

On other hand the respondent maintained that since there was no investigation report tendered, then that misconduct was not proved. On ignoring legal advice he stated that this claim is baseless on the ground that the respondent had no role of making decision but merely a conduit pipe for passing the document from authorizing department to the credit committee.

It is on record that the respondent was employed in a capacity of Head of Credit as per Exhibit AP 2 (employment contract). This means the respondent, being a head of credit department, had a duty of supervising credit application although in collaboration with other staff under Credit Department as per Exhibit D2 (credit assessment and approval at head office).

According to Exhibit D1 (Credit Assessment and Approval at head office) credit assessment and approval at head office starts its process from Credit Analyst, then to Manager, to Senior Manager,

then Head of Credit Dept (the respondent) and lastly to Chief Credit Officer. However, things are different in this matter as the respondent admits to have made changes in the application contrary to the professional advice of the Credit Analyst namely Zebedeyo **(See Exhibit D18 at page 6 which is the Outcome of Disciplinary Hearing Committee)** contrary to credit assessment and approval process as per **Exhibit D-1** which provides how to deal with Client applications. It is undisputed that the application of the Client was declined after its assessment by the credit analyst and another staff named Zebedayo and this denial was due to the character of Directors who had loan defaulting history. It is further on record that the Respondent continued to make changes by removing the bad history of credit applicants default which would affect applicant's decision on credit facility. (See page 7 paragraph 1 of Exhibit D18.). It is apparent that the alterations were made in disrespect to the professional advice regarding forged Colatrella's by issuing memo as indicated at page 128 of the CMA proceeding at page 128 paragraph 11.

In such circumstance where the respondent in his position in the Managerial Cadre failed to explain why he failed to act according to the professional advice of the credit analyst in my view, indicates bad intent against the interest of the employer. It was on this premise which lead the Disciplinary Committee to hold the Applicant liable to the disciplinary offence of concealing information with intent to cause loss to the employer.

From the above reasoning I am of the view that the disciplinary committee was correct to have held the applicant to have committed a serious misconduct through which he could never have been trusted by the employer. On such basis, the respondent's allegation regarding investigation report lacks merits basing on nature and circumstances of this application as the respondent admitted committing misconduct. I therefore differ with the arbitrator's findings which cleared the respondent from the misconduct he was convicted with in the disciplinary committee.

The second part of the question I raised is whether the disciplinary offence is such as grave as to constitute a reason for termination. Under the Employment and Labour Relations (Code of Good Practice) GN. 42/2007 a gross misconduct Causing serious damage (real or

potential) to or loss is constitute a good ground for termination. Gross dishonesty and gross negligence may lead to termination. This position was also emphasized in the cases of **Saganga Mussa V. Institute of Social Work,** Lab. Div., DSM Consolidated Lab. Rev. No. 370 of 2013 and **Institute of Social Work V. Saganga Mussa,** Consolidated Labour Rev. No. 430 of 2013.

In the instant matter concealing necessary information with intent to mislead the employer in my view constitute gross dishonesty which fall under misconduct which by all reasonable comprehension cannot be tolerated by such a delicate institution like a Bank (The Applicant). In my view, the applicant had a valid and fair reason for terminating the respondent after finding him guilty of such a misconduct.

Having found that the reason for termination was fair the next issue to be addressed is whether the respondent's termination was procedurally fair. On procedure, the only debated aspect is on the appropriateness of not serving the notice to the Respondent. In answering this question, as the termination was for misconduct the

relevant provision is Rule 13 of the Code. The provision provides:-

> *"Rule 13(1) The* ***employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.****"*

The above provision speaks itself that its purpose is to establish whether there is ground of initiating hearing. In my view, the application of the above provision depends on the circumstance of each case. If the ground is well known on the party of employer, then there is no need of conducting investigation. However, in the instant matter it is undisputed that the investigation was conducted, what disputed is the appropriateness of the applicant having it availed to the respondent and at Committee. I could not find a provision of law which makes it a mandatory requirement for that investigation report to be shared with the employee. Tendering it to the disciplinary committee of to the commission is a matter of choice of the Respondent. If there was another evidence which was sufficient to establish the case against the Respondent, the Applicant was right to opt not to tender it as evidence. Therefore, the applicant's argument of having the report not shared lacks relevance in this matter.

In such circumstance I agree with applicant's Counsel regarding the relevance of the principle in ***Deus Wambura's Case*** **(supra).**

There are several court decisions regarding the procedure for termination, that they should not be followed in a checklist form. In the case of **Justa Kyaruzi V. NBC Ltd.,** Revision No. 79 of 2009, Lab Division at Mwanza, it was held that:-

> *"What is important is not application of the code in the checklist fashion, rather to ensure the process used adhere to the basics of fair hearing in the labour context depending on the circumstances of the parties, so as to ensure the act to terminate is not reached arbitrarily. Admittedly, the procedure may be dispensed with as per Rule 13 (12) of the Code."*

Therefore, since the principles of natural justice were adhered to by the respondent, as the respondent was charged, replied to the charge and given right to defend his case before a Disciplinary Committee which was properly constituted, then, it is apparent that there was a fair procedure which lead to the Applicant's termination.

From the foregoing, it is my finding that, in this matter, the termination was both procedurally and substantively fair. I find that

the Applicant has managed to adduce reason for this Court to depart from Commission for Mediation and Arbitration award by a way of this revision.

Regarding relief of the parties, nothing to be awarded to the Respondent apart from the statutory terminal benefits other than compensation as the termination was procedurally and substantively fair.

Therefore, the application is allowed to the extent that the CMA order of compensation is hereby set aside and replaced by an order that the Respondent herein be paid all other statutory terminal benefits except the compensation. Each party to the suit to take care of their own cost. It is so ordered.

Dated at Dar es Salaam this 30th day of June, 2022.

KATARINA REVOCATI MTEULE

JUDGE

30/06/2022