IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATE REVISION NO. 324 OF 2021 & 326 OF 2021

TBP BANK PLC ..... APPLICANT

VERSUS

POSTER MAHABA ..... RESPONDENT

(From the decision Commission for Mediation and Arbitration of DSM at Ilala)

(Msina: Arbitrator)

dated 14th July 2021

in

REF: CMA/DSM/ILA/R.403/15/796

JUDGEMENT

16th June & 04th August 2022

Rwizile J,

The applicant TPB BANK PLC has filed this application against the decision of the Commission for Mediation and Arbitration (CMA). This court has been asked to call for records, revise and set aside the award of the CMA.

It has been stated that before Twiga Bancorp Ltd was merged with the applicant, the respondent was employed as the head of Finance and

Administrative Services until July 2015 when he was terminated for misconducts.

Dissatisfied with termination, the respondent successfully obtained an award for reinstatement from CMA. The applicant was aggrieved, she filed the application in protest before this court. It was heard, but finally a retrial was ordered. The matter was reheard where the respondent was now awarded compensate of 12 months salary. Both parties were unsatisfied, they filed applications to challenge the award. The two applications have been consolidated as per the order dated 10th May, 2022.

Both applications were supported by the affidavits stating grounds for revision. Upon consolidation, this court found that the award was challenged in two aspects, that is *validity of reason and procedure for termination, and on the amount of compensation awarded to the respondent*.

The hearing was conducted by way of written submissions. The applicant enjoyed the service of Mr. Godfrey Tesha, learned Advocate while the respondent was represented by Evans R. Nzowa learned Advocate.

On the issue of reason for termination Mr. Tesha submitted that there was an offence of failing to comply with TBLC Credit Policy 2011 by

recommending of an approval of an overdraft (OD) to Chikunyate Investment Company Ltd amounting TZS 50,000,000.00. The respondent according to him, exhibit TB8 showed he was the Ag. Head of Investment Banking (HIB) and signed the recommendation letter of approving the overdraft to the CEO. Accordingly, he added, facts admitted in civil proceedings need proof. To support his submission, he cited section 60 of the Evidence Act [CAP. 6 R.E. 2019].

He stated that according to the policy HIB, as an expert the respondent can recommend an overdraft be to be issued.

In this case, the respondent recommended an approval of an overdraft to a person who did not qualify. It is from that recommendation a loss of TZS 50,000,000.00 and interest was occasioned to the applicant.

On the charge of failure to publish the 2013 financial statements according to exhibit TB8, it was further stated that the respondent did not deny his duty to publish the said report of 2013. He said, the respondent admitted to be negligent. His admission according to the learned counsel, was clear that auditors found TBLC's information could not be obtained easily and quickly. According to the learned counsel, this resulted to the delay of auditing. He said further that the financial statement of 2012 was delayed.

He as well said, the respondent did not provide any evidence to prove his reason for delay.

On procedural aspect, he submitted that investigation report, exhibit TB1, showed only one charge of approving an overdraft and that the respondent was involved during investigation. He was therefore aware of it; it was vehemently argued. He continued to stated that exhibit TB8 proves that the respondent was given time to request for any document needed but did not do so. He stated further that the chairman found the respondent guilty basing on his admission in exhibit TB8 on recommending the approval of an overdraft.

Submitting on reliefs, the counsel held the view that the arbitrator was correct in not ordering reinstatement as prayed by the respondent. In support, he cited rule 32(2)(d) of the Labour Institutions (Mediation and Arbitration Guidelines) G.N. No. 67 of 2007.

He continued to argue that the respondent was terminated not by the applicant but by Twiga Bancorp Ltd. Twiga Bancorp according to his submission was dissolved. Its employees and assets were transferred to the applicant. Furthermore, he commented, there is no proof, if the structure has been changed and if the respondent's position is existing. He insisted that in the banking sector, honesty and integrity are key to

the business as in the case of **Twiga Bankcorp (T) Ltd v Assumpta Kimwaga**, Revision No. 151 and 167 of 2016 at page 14 paragraph 2 High Court (unreported), **NBC Ltd Mwanza v Justa Kyaruzi**, Labour Revision No. 79 of 2009, High Court at Mwanza at page 15 paragraph 4 (unreported) and **Charles Mwita v NMB Plc**, Appeal No. 112 of 2017, Court of Appeal at Dar es Salaam (unreported).

Further, he said, since the respondent admitted to have committed misconducts, compensation ought to have been reduced as was held in the case of **Sodetra (SPRL) Ltd v Njeru Mezza and Another**, Revision No. 207 of 2008 and **Felician Rutwaza v World Vision Tanzania**, Civil Appeal No. 213 of 2019, Court of Appeal of Tanzania at Bukoba at page 16. He lastly asked this court to set aside the award.

In responding, Mr. Nzowa submitted that the respondent was first suspended and then later terminated. He continued to argue that before termination, the investigation was conducted as part of disciplinary hearing. He cemented his submission by citing the case of **Hamisi Jonathan John Mayage v Board of External Trade**, Civil Appeal No. 37 of 2009 at pages 8, 9 and 10. He submitted that the respondent was not called to participate in the investigation and that he was not provided with the investigation report, he supported his argument by the case of

KCB (T) Limited v Dickson Mwikuke, Revision No. 45 of 2013 at page 6 and 7 (unreported).

In his view the applicant failed to provide the respondent with the investigation report which means there were no investigation conducted. He supported his submission by citing the case of **TTCL v James Mgaya and 3 Others**, Revision No. 30 of 2011, page 6. Moreover, he said, investigation is mandatory as provided for under rule 13(1) of G.N. No. 42 of 2007 and as held in the case of **Fredrick Mizambwa v Tanzania Ports Authority**, Revision No. 220 of 2013 at page 12 and 13, at Dar es Salaam.

Mr. Nzowa submitted that exhibit TB1 (investigation report on overdraft issues) has no relation with the purported investigation dated 20.04.2015 and suspension letter dated 06.05.2015. He stated that in exhibit TB6, the respondent was not found guilty by the board.

According to the learned counsel, rule 13(2) of G.N. No. 42 of 2007 read together with paragraph 4(3) of its schedule, provides that a formal charge has to be issued to the employee before the disciplinary hearing. He said, this is to inform the employee in writing of his allegations, for preparation of defence. Failure to comply, he added, renders termination invalid, he cited the case of **Jimson Security Service v Joseph**

Mdegela, Civil Appeal No. 152 of 2019, Court of Appeal of Tanzania at Iringa at page 8. He stated that in the notice to attend disciplinary hearing (exhibit TB7) there is no any allegations levelled against the respondent contrary the law.

He said, it is mandatory for the evidence to be brought at the disciplinary hearing in support to the allegations against the employee as provided under rule 13(5) of the G.N. No. 42 of 2007. He stated that according to exhibit TB8 (minutes of disciplinary hearing) the applicant did not adduce any evidence or call any witness to testify at the disciplinary hearing to prove the allegations. The respondent, he went further, was not given a chance to cross examine the witnesses. This position was cemented by the case of **National Microfinance Bank v George Athanasio Makange**, Revision No. 7 of 2013 at Morogoro at page 7.

Mr. Nzowa alleged that the hearing form was prepared on 29.06.2015 one week after the disciplinary hearing. In his view, there are possibilities that some contents including employers' evidence was filled in the form as an afterthought. Signing the form, done by the respondent does not amount to his admission but acknowledgement to receive the copy of the hearing as provided for under item 9(1) of the schedule to the Code of Good Practice the Guidelines for Disciplinary procedure.

Further, he said, the board of directors and C.E.O were not supposed to be part of the disciplinary hearing since they had dealt with the matter before. This in his view is contrary to Rule 13(4) of Code of Good Practice and paragraph 4(2) of the schedule to the Code of Good Practice the Guidelines. He had the view that the board and C.E.O actions were acts of bias, he referred me to **Hamisi Jonathan John Mayage** (supra) at page 6 and 7. He submitted that exhibit TB6, TB8 and TB9 show that the C.E.O participated in decision to terminate the respondent. Here, his view was supported by the case of **Jimmy David Nongya V. National Insurance Corporation Ltd** (1994) TLR. 28. He finalized by stating that the termination procedurally was unfair.

Mr. Nzowa on the issue of reasons for termination, he submitted that termination substantively was unfair. He stated that at the hearing three allegations were read to the respondent. In the hearing form, he added, there is no finding of guilty of any offence or allegation. He cited item 4(7) of the schedule to the Code of Good Practice, the Guidelines. In his view, the disciplinary hearing committee and the chairperson were undecided on whether the employees were guilty or not. Therefore, his contention is that the respondent should be given the benefit of doubt. He then

stated that the applicant had no reason to terminate the respondent for he did not commit any offence.

On reliefs, Mr. Nzowa argued, that remedies for unfair termination are provided for under section 40(1)(a)(b) and (c) of the Employment and Labour Relations Act, [CAP. 366 R.E. 2019]. In his view, because the termination was both procedurally and substantively unfair the proper remedy would be re-instatement.

In a rejoinder Mr. Tesha submitted that investigation is part and parcel of the hearing and that the employee is intitled to be heard during investigation. He stated that from the date of suspension to the date of investigation, he was never called or summoned to participate. To strengthen his point, he cited the case of **Hamis Jonathan John Mayage V. Board of External Trade**, Civil Appeal No. 37 of 2009. He stated that investigation requirements are provided under rule 13(1)(2)(3)(4) and (5) of The Employment and Labour Regulations (Code of Good Practice) Rules, G.N. No. 42 of 2007.

He continued to argue that the applicant did not pronounce conviction based on the investigation report.

He stated that the cases cited by the respondent are distinguishable. He said, in the case cited, the applicant was not called to attend/appear to

the disciplinary meeting at all, he only submitted his defence. He then stated that exhibit TB3 proves that he was served with the notice of allegations and was also supplied with documentary evidence presented before the disciplinary hearing. The learned counsel otherwise reiterated his submission in chief and prayed, the application be granted.

Having heard both submissions, as I have shown before, in labour disputes, where termination is an issue, the court has to determine fairness of termination, in terms of substance and procedure. That is to say, if termination was grounded on valid reasons and if the procedure employed in a termination process was valid and fair. The answer to the two pertinent issues determines what would be the reliefs to the parties.

To determine if there were reason(s) for termination, section 37 of Employment and Labour Relations Act [CAP. 366 R.E. 2019], [ELRA] provide the answers. It plainly states that, for termination to be fair, there has to be valid reasons for termination and also the procedure to it has to be complied with. In the case of **St. Joseph Kolping Secondary School v Aluera Kashushura**, Civil Appeal No. 377 of 2021, at page 15, the Court of Appeal had this to say in respect of section 37;

> *"In view of the foregoing discussion, therefore, the labour Court Judge was right in holding that, termination of respondent's*

employment contract could not be fair without being based on fair reasons and procedures set out under section 37 of ELRA."

The onus to prove if there were valid reasons and that procedures were followed lies to the employer as under section 39 of ELRA.

Nonetheless, the Court of Appeal in the case of **Fredy Ngodoki v Swissport Tanzania PLC**, Civil Appeal No. 232 of 2019, at page 4, held that: -

"In order to discharge the burden, the employer must prove that the employee was terminated for a valid and fair reason and upon a fair procedure."

In this case, the applicant stated that the respondent was charged with three offences, namely: -

1. Gross Misconduct contrary to section 12.3.8 (d) of the Twiga Bancorp Staff Regulation and Scheme of Service Policy 2013 – non observance of the required procedures,
2. Contravention of the Bank's Staff Rules contrary to section 12.3.8 (f) and
3. Gross Negligence under section 12.3.8 (p) for gross negligence.

In determining if the offences were proved, it can be noted that, there is no dispute that the respondent was the employee of the applicant. There is also no dispute that the respondent while on employment had carried different positions. And at the time he was terminated he was in the position of Finance Manager.

Even though on the first offence charged, applicant's submission stated that the respondent admitted to the offences during disciplinary hearing but in the testimonies of DW1 shows different. DW1 stated that the respondent being the head of investment banking approved the loan with the C.E.O. as seen here below foe easy refence in untyped proceeding: -

> *"Hakukuwepo na income tax returns. Vilevile hakukuwa a risit report na pia hakukuwa na Business profile. Mkopo ulikuwa approved na Poster Mahaba akiwa Head of Investment Banking tarehe 24.01.2013 pamoja na C.E.O wakati huo akiwa H.H. Mbululo. Kingine ni kwamba tarehe 17.01.2013 fedha ikatolewa (50M) kwenye Account ya Sundry Debtors Suspense Account na hiyo voucher iliyofanya hiyo withdrawal kutoka kwenye inter Account ilisainiwa na Branch Manager Mr. S. Komba. Tulivyomuhoji Mr. Komba (Branch Manager) kwamba alivyofanya hivyo akasema yeye*

alifanya hivyo kwasababu alikuwa ameagizwa na C.E.O H.H. Mbululo ili akishazitoa ampatie Poster Mahaba..."

He continued that: -

"... tulivyomuhoji Mr. Mbululo kwanini alifanya hivyo 50M itoke akatuambia kwamba Poster Mahaba ndiye alimshauri kwamba wazitoe hizo 50M ili mteja aweze kupata fedha hizo kwakuwa alikuwa na uharaka na pia alisema ya kwamba alifanya hivyo kwa kuwa alimuamini Poster na huyo mkurugenzi wa Chikunyati"

On the second offence charged it was submitted by the applicant that the respondent was the one who had the obligation to advice the C.E.O and that he misled him to give the loan as the client was in hurry contrary to staff regulation and scheme of service policy 2013. And another was to maintain exchange rate of 1450 against the market rate and failing to publish financial report of the year 2013 in time as it was his obligation. In all, there is no evidence to prove the allegation. The extract of evidence below in untyped testimony states;

"Mbele ya tume hii hakuna ushahidi unaonyesha juu ya Poster Mahaba kuwa ame approve mkopo huo...

Hakukuwa na footage za CCTV (missed footage) na hatukuweza kubaini nani alizichukua footage hiyo"

Going through the evidence tendered at the disciplinary hearing, it has been observed that the respondent denied all offences charged. As shown before and in terms of section 39 of ELRA and rule 9(3) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007, the employer is not only cast with the duty of proving fairness of terminal. The employer, is required to do so at the preponderance of probabilities. This means, the CMA and this court have the duty to measure the evidence by the parties in comparison to see if there is some proof of the alleged misconduct. This evidence must be clear and free from ambiguities.

In my consideration the applicant as an employer did not prove that the offences charged were proved committed by the respondent. Taking the evidence of the applicant, for instance, Dw1 stated that video footages from a CCTV camera were not found. It has not been proved that the respondent worked out of the parameters stated at the workplace rules and regulations. As well, if the same was out of the standard operating procedure at his workplace and in particular the post he held.

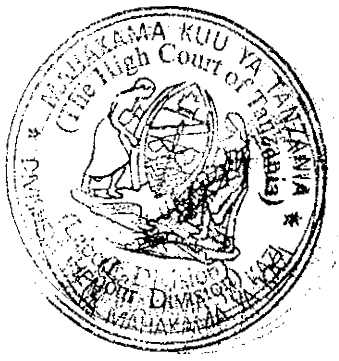
The second point to determine is about procedure. Under Rule 13 of the Code of Good Practice, G.N. No. 42 of 2007, provides the procedure, for termination to start with investigation of the misconduct whenever it is reported. It was testified and evidence to the effect is not I short supply as exhibit TB1 shows.

After the investigation process, if the employer finds a prima facie case, that misconduct was done and so forms an opinion to prosecute, he should initiate the formal charge. This was also done and there was a kind of a hearing form supplied, exhibit TB7 dated 15th June, 2015 is to that effect. Upon initiating the formal charge, the employee should be given reasonable time of atleast 48 hours to prepare for the disciplinary hearing, this is proved by exhibit TB6 dated 02nd July, 2015.

Then, the hearing follows and should be conducted by the senior officer who has not been involved in the circumstances giving rise to the case. In all, I have to comment here that the procedure for conducting a disciplinary hearing was followed.

On the third issue of relief, as it has been determined that there was no valid reason for termination. The order for reinstatement as provided for under section 40(3) of ELRA is given or compensation of 15 months as

provided under section 40(1)(c) of ELRA. CMA award is revised to that extent. As this is a labour matter, I order no costs.



A. K. Rwizile

JUDGE

04.08.2022