IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 90 OF 2023

(*Arising from an Award issued on 16/03/2023 issued by Hon. U. N. Mpula, Arbitrator, in Labour dispute No. CMA/DSM/KIN/380/2021/162/2021 at Kinondoni)*

STANBIC BANK TANZANIA LIMITED..... APPLICANT

VERSUS

HELLEN MAKANZA..... RESPONDENT

JUDGMENT

Date of last Order: 13/06/2023
Date of judgment: 11/08/2023

B. E. K. Mganga, J.

Brief facts of this application are that, on 1st October 2006, Stanbic Bank Tanzania Limited, the herein applicant employed Hellen Makanza, the herein respondent, as Head of Credit support for unspecified period contract of employment. In 2013, applicant appointed respondent as Head of legal and Company Secretary, the position that respondent held up to 2016. In 2016, applicant split the position of head legal and company secretary into two namely (i) Head of Legal and (ii) Company Secretary. Due to that split in 2016, respondent became the Company secretary of the applicant. The parties continued to enjoy their employment relationship

until on 9th July 2021 when respondent put a drop of lemon water into the eyes of the respondent. It is undisputed that, on 9th July 2021, applicant served the respondent with a disciplinary charge containing five counts all relating to poor performance requiring her to attend disciplinary hearing on 13th July 2021. It is also undisputed that the said charge was changed as a result, on 26th July 2021, applicant served the respondent with the notice to attend performance hearing containing two allegations /counts namely(i) unacceptable frequencies of missed timelines/late Submissions and (ii) recurring and unacceptable level of poor quality of deliverables. Particulars in the first count/ allegation were that, while performing her duties as Company Secretary of Stanbic Bank Tanzania Limited, respondent's submissions were continuously late and beyond the deadline, despite several reminders from the Chief Executive and that the said delays in submissions impacted on effectiveness of other processes and decisions that are dependent on respondent's submissions. Particulars in the second count/ allegation were that, while performing her duties as a Company Secretary of Stanbic Bank Tanzania Limited, her submissions (reports, minutes, letters ect.) were in repeated instances, been of poor quality to an extent that is unacceptable for the level of qualification and expectation. The particulars of the second count were further that, respondent's

submissions generally contained unacceptable level of grammatical errors, typographical errors, as well as omissions of important content and that, poor quality of submissions necessitated reworks which unnecessarily consumed time of the reviewers, resulting in inefficiencies.

Based on the above-mentioned charge, on 28th July 2021 performance hearing was conducted via Microsoft Teams, as a result, the poor performance committee found the respondent guilty and proposed termination of her employment. Respondent appealed to the Board of Directors complaining that (i) the performance management procedure and guideline for poor performance management of the applicant was not followed because there was no warning letter, (ii) change of the charge from disciplinary hearing to performance hearing, counts were reduced but supporting annextures were increased without adequate reason, (iii) Bank did not implemente some of the agreed action from the special performance plan of 2018 on mentorship and training, (iv) the meeting relating to special performance support plan was not done, (v) during hearing, there was no person with company secretarial skills, (vi) there was bias because the initiator/complainant in the performance hearing reports to CEO, (vii) during hearing, there was no independent observer, (viii) the decision to terminate her employment was made by the Board on 17th May

2021 prior performance hearing was conducted,(ix) evidence of the Bank was not corroborated, (x) the decision to terminate her employment was disproportionately harsh and sudden because she worked with the CEO virtually during Covid 19 pandemic, (xi) the decision to terminate her employment did not consider her previous good performance because she was given bonus from 2017 to 2020 and was served with reward letters for the year 2018, 2019 and 2020, (xii) the Bank did not hold performance assessment under an independent panel contrary to what was agreed on 4th December 2020 and (xiii) that due process was not followed.

It is undisputed by the parties that, on 26th August 2021, the Board of Directors dismissed respondent's appeal and confirmed the decision of the performance hearing committee. It is further undisputed by the parties that, on 31st August 2021, applicant served respondent with a termination letter showing that respondent was terminated due to poor performance.

Applicant was aggrieved with termination of her employment, as a result, on 28th September 2021, she filed labour dispute No. CMA/DSM/KIN/380/2021/162/2021 before the Commission for Mediation and Arbitration henceforth CMA at Kinondoni complaining that she was unfairly terminated. On fairness of reason of termination, respondent indicated in the Referral Form (CMA F1) that reasons did not align to the

charges. On fairness of procedures, she indicated that, procedures provided for in the Company Policy and Employment and Labour laws were not complied with. Based on that, respondent indicated in the said CMA F1 that, she was claiming to be reinstated or be paid TZS 11,789,439,037.26 as compensation.

On 16th March 2023, Hon. U. N. Mpulla, Arbitrator, having heard evidence and submissions from both sides, issued an award in favour of the respondent that termination was both substantively and procedurally unfair. The arbitrator found that the Board of Directors issued a resolution for respondent to be terminated prior serving the respondent with the charges and prior conducting performance hearing by the committee and that, the hearing committee was set in a checklist fashion to confirm the decision of the Board. The arbitrator found further that, the Board of Directors were judges of their own case when they heard and dismissed the appeal by the respondent. In the final analysis, the arbitrator awarded respondent to be paid TZS 374,295,088/= being salary compensation for 20 months and TZS 336,865,580/= being 18 months salary remuneration from the date of termination to the date of the award. In total respondent was awarded to be paid TZS 711,160,668/=.

Applicant was aggrieved with the said award hence this application for revision. In support of the Notice of Application, applicant filed the affidavit sworn by Eric Rwelamira, the Head of the Legal Department containing 12 grounds as hereunder:-

i) That the arbitrator grossly erred in fact and law by holding that the Respondent's performance standards were unreasonable as alleged grammatical and typographical errors, lack of attention to details, accountability and late submissions were human errors thus the applicant had no valid reason to terminate the Respondent.

ii) The arbitrator erred in law and the fact by holding the Respondent's.

iii) That the arbitrator erred in law and fat for not holding that the Applicant did not take into account the inputs of Rule 17(i)(d) of GN. 42/2007 and further that acted with bias by holding that Respondent's reasons for delays to perform her duties were not challenged during cross examination while the Respondent was exhaustively cross examined on the aspect by the Applicant and she had no evidence on alleged delays by EXCO members.

iv) That the arbitrator erred in law and in fact for failure to take into account evidence before him that the Respondent had admitted that her performance was not where it is not supposed to be irrespective of all the applicant various assistance to help her to performance, therefore she had failed to perform her duties.

v) The arbitrator grossly erred in law and in fact for failure to consider the fact that failure by the Respondent to appeal internally against her performance rating before the performance hearing signified her acceptance of her performance rating and the consequences thereat.

vi) That the arbitrator erred in law and in fact for failure to take into account the inputs of rule 18(5)(a) & (b) of GN 42 of 2007 in light of the fact that the

Respondent has been a consistent non-performer from 2016, 2017, 2018, 2019 and 2020.

vii) That the arbitrator erred in law and in fact for holding that the performance hearing in respect of the Respondent was done to confirm the decision of the board and that it was a rubber stamping exercise to approve a known decision. The arbitrator had bias in arriving in to this conclusion as he failed to appreciate that the Respondent's performance was being evaluated by two independent bodies i.e. the Board of Directors and the Respondent's line manager where each body came up with its own findings in regard to the Respondent's performance.

viii) The arbitrator erred in law and in fact for punishing the Applicant on procedural ground for having the Board of Directors entertaining the Respondent's appeal alleged after being involved in the matter before.

ix) That the arbitrator erred in law and in fact for misinterpreting Rule 18(c) of GN No 42/2007 by holding that the Applicant did not conduct an investigation before the performance hearing, in so during the arbitrator failed to take into account that investigation in regard to the Respondent's performance was comprehensively conducted during the December 2020 annual performance review where the Respondent actively participated in the review and followed by a performance feedback meeting.

x) That the arbitrator erred in law and fact by awarding conjunctively remedies found (sic)at section 40(i)(a)&(c) of the Employment and Labour Relations Act CAP 366 RE 2019 as the arbitrator awarded the Respondent's 20 month's salaries equal to TZS 374,295,088 as compensation for unfair termination and 18 month's salaries equal to TZS 336,865,580 as compensation instead of being reinstated.

xi) That the arbitrator erred in law and in fact for awarding compensation exceeding 12 month's remuneration without justification.

xii) That generally the Arbitrator erred in law and in fact for failure to consider substantively the evidence supporting reasons for termination and accord the termination grounds deserving weight.

I have decided to reproduce the above grounds of revisions as they were drafted by the deponent on behalf of the applicant in this application without editing them because, the reason for termination of respondent was poor performance including typographical and grammatical errors and late submissions. The above grounds of revision were drafted by the head of legal of the applicant and passed in the hands of the learned counsel who, with all forces submitted that termination was fair both substantively and procedurally because minutes of the respondent contained typographical and grammatical errors. With those submissions in my mind, I decided to leave those grounds to speak on their own and guide the court in deciding this application.

In opposing the application, respondent filed her counter affidavit.

When the application was called on for hearing, Mr. Arobogast Anthony Mseke, learned counsel, appeared and argued for and on behalf of the applicant while Ms. Ernestilla Bahati, learned counsel, appeared and argued for and on behalf of the respondent.

Mr. Mseke, learned counsel for the applicant, opted to argue the aforementioned grounds separately. Submitting in support of the 1st ground, learned counsel for the applicant argued that, the arbitrator grossly erred in fact and in law by holding that respondent's performance standards were unreasonable because, the alleged grammatical and typographical errors, lack of attention to details, accountability, and late submissions, were human errors thus, applicant had no valid reason to terminate respondent. Learned counsel for the applicant also submitted that, respondent's employment was terminated on 31st August 2021 due to poor performance. He went on that, respondent was terminated due to poor performance based on typographical errors, grammatical errors, lack of attention to detail, accountability, and late submission and referred the court to performance report of 2020 and the employee/line manager performance feedback session for the year 2020 (exhibits D22 and D23 respectively). Counsel for the applicant strongly submitted that, those were not mere human errors because, those errors went to the extent of vitiating the contract between the applicant and the respondent. Counsel for the applicant submitted further that, job description (exhibit D6) has details of what respondent was supposed to do and that, exhibit D22 shows what was agreed to be performed by the respondent and what was

achieved. Learned counsel for the applicant strongly submitted that, termination of employment of the respondent based on typographical and grammatical errors was fair. When probed by the court as to whether, documents signed by other employees of the applicant including the one who signed the affidavit in support of this application does not contain typographical and grammatical errors, he readily conceded that, they do. Counsel for the applicant conceded that even the affidavit in support of the application contains typographical and grammatical errors and that, applicant has not terminated employment of those employees.

Learned counsel for the applicant submitted that, the issue of poor performance of respondent started in 2016. He submitted further that, respondent was employed in 2006 but in 2013 she became Head of Legal and Company Secretary. He added that, since 2013 respondent was performing the duties of Company Secretary and Head of Legal. He went on that, in 2016 the post of the Company Secretary and Head of Legal changed into (i) Head of Legal and (ii) Company Secretary and that, therefrom, respondent was assigned to perform duties of Company Secretary that she was performing before. Counsel for the applicant submitted that, when respondent was alone, she was performing well but after separation of the post into two, she performed poorly. Counsel

submitted further that, respondent was afforded training on Governance and Secretarial Service in South Africa and Nigeria and referred the court to Stanbic Bank Training Requisition Form (exhibit D21) to support his submissions. Counsel submitted further that, in the said training, respondent was taught how to right minutes. He added that, prior to 2016, respondent was the one who was taking minutes. Counsel for the applicant submitted further that, in 2006 at the time of joining the applicant, respondent indicated that she used to take minutes and Secretarial Service as she indicated in her Curriculum Vitae (exhibit D1).

Learned counsel for the applicant submitted that, in 2016, respondent scored the lowest rating as evidenced by exhibit D8 and that, in 2017, she made progress but in 2018, she dropped and scored the lowest. Counsel went on that, when respondent's performance was dropping down, she was advised to go for medical examination. Counsel referred the court to a letter dated 14th July 2017 signed by Rabina Masanja, Senior Human Capital Business Partner directed to the Managing Director, AAR Hospital Tanzania and a letter dated 4th August 2017 from AAR Healthcare to the applicant (exhibits D11 and D12 respectively) and submit that, after examination, it was found that respondent was mentally and physically fit for employment.

Counsel for the applicant submitted further that, in 2018, respondent was put into performance improvement plan, as a result, she improved performance from the lowest rating to making progress. He went on that, in 2019, respondent performed poorly and was rated to the last category, as a result, she was put again into performance improvement plan and made progress to 2nd category from the lowest. Counsel submitted further that, in 2020 performance, respondent performed to the lowest category and that she could not be exposed to performance improvement plan because the policy changed hence Senior Managers were not entitled to that plan. Mr. Mseke submitted that due to poor performance, respondent was subjected to performance hearing that led to termination of her employment.

Counsel for the applicant referred the court to exhibits D34, D35, D36, D37, D38, D39, D40, D41, D42, D43, D44, D45, D46, D47, D48, D49, D50, D51, D55, D56, D57, D58, D59, D60, D61 and D62 and submitted that, these exhibits demonstrate how typographical errors, grammatical errors, lack of accountability, lack of attention to details and late submissions meant. On late submissions, counsel for the applicant submitted that, respondent was submitting minutes late contrary to timelines i.e., ten days after a meeting was conducted. Counsel further

referred the court to exhibits D24, D25. D26, D27, D28, D31, D32, D33, D30 and D24 to shows how respondent was late in submissions. Counsel submitted further that, minutes were shared by uploading in the system and email correspondences. Learned counsel strongly submitted that, all these are not human errors because, they were prevalent and serious errors.

Arguing the 2nd ground, Mr. Mseke submitted that, DW1 did not admit to have contributed to failure of the respondent to perform her duties and referred the court to exhibits D39, D40, D41, D42 and D43. Learned counsel submitted further that, respondent sent exhibit D39 directly to the members of the Board of Directors without sharing with the CEO. He went on that, when CEO asked respondent as to why she sent minutes directly to Board members before being reviewed by him (CEO), respondent recalled the minutes (exhibit D40), prepared, and shared with the CEO and that, after reading, the CEO found that there were a lot of errors and returned the minutes to the respondent for correction as per exhibit D42. When probed by the court as to the time spent by the CEO in reviewing the said minutes, counsel submitted that, he cannot recall the exact time. Mr. Mseke submitted further that, in exhibit D43 the CEO

apologized to the respondent that she should use the later version and not the earlier email.

Regarding the 3rd ground, counsel for the applicant submitted that, there were no justifiable reasons from the respondent for the omissions or committed errors or as to why, she performed her duties poorly. Mr. Mseke submitted further that; it was only in an email (exhibit D15) wherein respondent stated that CEO must support Company Secretary in controlling behavior of excom-members. During hearing, Mr. Mseke conceded that exhibit D15 was tendered by the applicant. Counsel for the applicant went on that, it was not proper for the arbitrator to hold that evidence of the respondent was not shaken during cross-examination while the same was shaken. He submitted further that, in performance hearing (exhibit D63), respondent did not defend that Executive Committee members contributed to her poor performance rather, she stated that errors are human and admitted to have poorly performance.

Regarding the 4th ground, Mr. Mseke, submitted that he covered this ground when he referred to exhibits D23, D63, D12, D21, D11, D9 and D10 because respondent was put to training plan in South Africa and Nigeria. He submitted further that, training respondent in South Africa and Nigeria were efforts that were taken by the applicant to ensure that respondent

perform, but all were of no help. In his submissions, Mr. Mseke, conceded that, this ground is not well drafted because of inclusion of "not". He therefore, conceded that there is grammatical error in this ground and that, the same was drafted by the Head of Legal.

Arguing the 5th ground, Mr. Mseke submitted that, the arbitrator erred for failure to consider that, failure of the respondent to appeal against her performance rating before the performance hearing, amounted to acceptance of her performance and consequences thereof. He argued that, it is applicant's policy (exhibit D18) that an employee has a right to appeal against performance rating if he/she is aggrieved.

Regarding the 6th ground, Mr. Mseke submitted that, the issue of time to improve cannot apply because, respondent was in Managerial Cadre (exhibit D7). He concluded that, procedural aspect of fairness of termination provided for under Rule 18(5)(a) and (b) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 in relation to opportunity to improve, cannot apply to the respondent.

Regarding the 7th ground, Mr. Mseke, submitted that, arbitrator erred to hold that, the decision to terminate respondent was done to confirm the decision of the Board of Directors and that it was a rubber-stamping

exercise to approve unknown decision. He submitted further that; the arbitrator was biased. He submitted further that, the Board of Directors was also managing performance of the respondent and that, on 17th May 2021, in an Extra Ordinary Board Meeting, it was opined that respondent should be replaced. He added that, performance hearing (exhibit D63) was conducted on 28th July 2021 and termination was on 31st August 2021.

Arguing the 8th ground, Mr. Mseke, learned counsel for the applicant submitted that, after the proposed termination, respondent filed an appeal to the Board of Directors on 05th August 2021 (exhibit D65), but the Board of Directors upheld the decision to terminate her employment. In his submissions, Mr. Mseke conceded that the Board of Directors had involved itself in the matter prior to hearing the respondent's appeal. He maintained that, though the Board of Directors had involved itself in the issue, that did not amount to procedural unfairness because, respondent willingly appeared before the Board of Directors and the said Board of Directors was the last appellate platform. Learned counsel for the applicant argued further that, there was no essence the respondent to appeal to the Board of Directors because the said Board of Directors had already adjudged the matter. Counsel for the applicant went on that, the Board of Directors had

power to alter or confirm the decision of the performance hearing committee and that, in the application at hand, the Board of Directors dismissed respondent's appeal on 26th August 2021 (exhibit D67) and confirmed termination. He concluded that, respondent's employment was fairly terminated on 31st August 2021 (exhibit D69).

Arguing the 9th ground, Mr. Mseke, learned counsel for the applicant submitted that, the arbitrator misinterpreted Rule 18(c) of GN. No. 42 of 2007 in holding that there was no investigation conducted prior to performance hearing. Mr. Mseke referred the court to Rule 18(1) of GN. No. 42 of 2007(supra) to support his argument. Upon reflection, learned counsel for the applicant was quick to submit that, it was a typing error for this ground to read 18(c) of GN. No. 42 of 2007(supra) because applicant intended to cite Rule 18(1) of GN. No. 42 of 2007(supra). He submitted further that, Rule 18(1) of GN. No. 42 of 2007(supra) does not state that employer is bound to conduct investigation before terminating an employee for poor performance. He went on that; the said Rule only requires employer to investigate reasons for unsatisfactory performance and reveal the extent to which it caused the employee to perform poorly. Counsel for the applicant was quick to submit that exhibit D22 is an

investigation hence Rule 18(1) of GN. No. 42 of 2007(supra) was complied with and that, continuous assessment is an investigation. He added that, exhibits D8, D9, D10, D11, D12 are investigations because investigation is not confined to a short period prior to termination.

Regarding the 10th ground, Mr. Mseke submitted that, the arbitrator erred to award respondent the remedies both under Section 40(1)(a) and (c) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019]. Counsel for the applicant submitted that, respondent was awarded TZS 374,295,088/= being 20 months salaries compensation and TZS 336,865,580/= being 18 months salaries compensation instead of reinstatement. He strongly submitted that, these remedies are not awardable conjunctively but disjunctively and cited the case of ***National Microfinance Bank v. Leila Mringo & 2 Others***, Civil Appeal No. 30 of 2018, CAT (unreported) to support his submissions. He submitted in alternative that, if the Court finds that respondent was unfairly terminated, it should hold that arbitrator was supposed only to award 20 months salaries.

Regarding the 11th ground, Mr. Maseke submitted that, the arbitrator erred to award 20 months compensation that exceeds 12 months

compensation without giving reasons to justify that award. He submitted that he argued the 12th ground in due course of arguing other grounds and refrained to make submissions again on the said ground. Learned counsel for the applicant concluded his submissions by praying that the application be allowed because applicant complied with the provisions of Rule 18 of GN. No. 42 of 2007(supra).

Resisting the application, Ms. Bahati, learned counsel for the respondent submitted to the 1st ground that, applicant did not prove that respondent's work contained grammatical and typographical errors. She submitted further that; exhibits referred to by counsel for the applicant are emails from the Line Manager of the respondent. She went on that, exhibit D44 does not show typographical or grammatical error, rather, rephrasing of sentences or removal of some words. She added that, it was only preferences and choice of language. Ms. Bahati submitted further that, DW1 while under cross-examination, was unable to point out the alleged typographical and grammatical error.

On late submissions of minutes, Ms. Bahati submitted that, respondent gave various reasons including failure of the executive

committee members to give feedback in time (exhibits D15, D23 and D59) and being unwell as she notified her line manager (exhibit P5 and P4).

On lack of attention to detail and accountability, Ms. Bahati submitted that; applicant did not adduce evidence to prove this allegation. She went on that; applicant is relying on emails from the Line Manager of the respondent because there is no actual document that was tendered as evidence. She submitted further that, DW1 started to work with applicant in April 2020 and within few months working with the respondent virtually during COVID 19, formed negative opinion against the respondent. Learned counsel for the respondent submitted further that, during cross-examination, DW1 admitted that some information on respondent's performance was in respondent's file and that, based on that information, he formed opinion against respondent's performance. Counsel for the respondent submitted further that, the arbitrator did not error to hold that the standard to which respondent was subjected was unreasonable because, typographical errors can be committed by anyone including DW1. Counsel submitted that, the line Manager (DW1) sent a wrong set of documents (exhibit 43) and thereafter apologized and asked respondent to use a different document. Counsel for the respondent strongly submitted

that, there was no known or prescribed standard to be met by the respondent for the Court to conclude that respondent performed poorly. She added that, mere existence of typographical errors does not render a person unfit for a job.

Responding to the 2nd ground, Ms. Bahati submitted that, during hearing at CMA, DW1 tendered exhibits D47 and D43. Learned counsel submitted further that, on 26th January 2021 respondent sent an email (exhibit D47) to DW1 asking DW1 to review the document but DW1 reviewed and returned to respondent on 01st March 2021 (exhibit D48). Ms. Bahati submitted further that, during cross-examination, DW1 admitted that his delay to review that document, had effect on timeline of the respondent to make submissions. she submitted further that, DW1 admitted to have contributed to some of the delays.

Arguing against the 3rd ground, Ms. Bahati submitted that, exhibits D15, D23, and D59 are communications from respondent to her Line Manager (DW1) and her former Line Manager as contributory factors for her delay. She went on that, exhibits P4, P5 and P6 shows that respondent was unwell on various dates hence contributed to late submission. Learned counsel for the respondent submitted further that, Rule 17(1)(d) of GN.

No. 42 of 2007(supra) requires the arbitrator or Judge to consider reasons why employee failed to meet the standard. Ms. Bahati submitted further that, there was no standard by the applicant requiring absence of grammatical error or typographical error in the works of her employees. In alternative, learned counsel submitted that, reasons adduced by respondent as to what contributed to poor performance were valid and were not shaken during cross-examinations. Counsel for the respondent submitted further that, respondent testified on incidences of sickness, delays of review of minutes by members of the Executive Committee, delay by DW1 to review minutes as evidenced by exhibit D47 and blanket reviews done by DW1 directing respondent to look on the document without telling her what should be looked at hence leading back and forward of the document.

Countering submissions made by counsel for the applicant to the 4th ground, Ms. Bahati submitted that, in stating that her performance was not where it was supposed to be, respondent did not mean that she admitted under performance. Learned counsel submitted further that, in exhibit D63, respondent gave challenges she faced including short period she worked with DW1, new writing style of CEO etc. Ms. Bahati concluded that,

respondent never admitted that her performance was poor, rather, that it was supposed to be higher and needed support to the challenges she pointed out.

Regarding the 5th ground, Ms. Bahati submitted that, at page 9 of exhibit D18 shows that it is the responsibility of the Line Manager to educate team members on performance process and tools. She went on that, in the session that was held on 04th December 2020 (exhibit D23), DW1 did not inform respondent that she had a right to appeal. Counsel went on that, failure of the respondent to appeal cannot be taken that she accepted the rating. Counsel for the respondent submitted further that, in exhibit D23, respondent stated that, five meetings happened in a week, and she must work on several documents in that short period which affected her performance. Learned counsel submitted further that, the training in South Africa was cut shot hence it was not completed.

Regarding the 6th ground, learned counsel for the respondent submitted that, in 2017, 2018 and 2019, respondent was paid TZS 60,500,000/=, TZS 38,000,000/= and TZS 42,000,000/= respectively as bonus as evidenced by exhibits P1, P2 and P3 respectively. Learned

counsel submitted further that, respondent was not poorly performing, which is why, she was paid bonus.

Responding to submissions made on behalf of the applicant on the 7th ground, Ms. Bahati, learned counsel for the respondent submitted that, on 17th May 2021, the Board of Directors resolved that respondent should be replaced and directed DW1 to recruit a replacement of the respondent as evidenced by exhibit P7. Learned counsel submitted further that, that was done while respondent was still an employee of the applicant. She went on that, two months later, respondent was served with the notice to attend the disciplinary hearing. Counsel argued that, respondent was literally terminated two months before performance hearing. Learned counsel for the respondent argued further that, if at all the Board of Directors was reviewing performance of the respondent, it could have only suggested that respondent is not performing and not to order that respondent should be replaced and direct DW1 to recruit another employee in the position of the respondent. She added that, the hearing that took place on 28th July 2021 was a mere rubber-stamping exercise with the aim of carrying out the directives of the Board of Directors. Counsel went on

that, in no way, DW1 could have disobeyed the order of the Board of Directors because he is appointed by the said Board of Directors.

Regarding the 8th ground, learned counsel for the respondent submitted that, the Board of Directors had decided in May 2021 that respondent should be terminated but the same Board of Directors sat on its own case, heard, and dismissed the appeal of the respondent. Learned counsel submitted further that, in those circumstances, the Board of Directors could have refrained to hear the appeal of the respondent. Learned counsel submitted further that, respondent (PW1) testified that the Head of Human Capital advised her to appeal to the Board of Directors. Learned counsel argued that, it was the duty of the applicant to direct what procedures respondent was supposed to follow.

Responding to submissions made on the 9th ground, Ms. Bahati, learned counsel for the respondent submitted that, under Rule 18(1) of GN. No. 42 of 2007(supra), it is mandatory for the employer to conduct investigation to know the cause of poor performance of the employee. She strongly submitted that, exhibits D8, D9, D10 and D23 an email from respondent's former Line Manager before DW1 joining the applicant listing areas of concern (exhibits D8), a letter date 19th August 2016 written by

the applicant to respondent concerning respondent's health and recommending respondent to contact medical practioner for examination (D9) and minutes dated 19th August 2016 between respondent and applicant (D10) does not qualify to be investigation. Learned counsel submitted further that, minutes of a meeting held on 04th December 2020 between DW1 and Head of Human Capital on one side, and the respondent, on the other, (exhibit D23) does not qualify to be investigation. Counsel for the respondent concluded that conditions set under Rule 18(1) of GN. No. 42 of 2007(supra) were not complied with by the applicant.

Responding to submissions made on the 10th ground, Ms. Bahati, learned counsel for the respondent submitted that, respondent was never awarded reinstatement as a remedy for unfair termination. She submitted that respondent was awarded 20 months salaries for unfair termination and 18 months being remuneration from the date of termination to the date of the award.

Regarding the 11th ground, counsel for the respondent submitted that, the arbitrator gave justification for awarding respondent the said 20 months. In the alternative, she submitted that Section 40(1)(c) of Cap.

366 R.E. 2019 (supra) gives powers to arbitrators to award not less than 12 months.

Regarding the 12th ground, learned counsel for the respondent submitted that, applicant did not adduce evidence to support the alleged grounds of termination of respondent due to poor performance. She therefore prayed the application be dismissed for want of merit.

In rejoinder, Mr. Mseke, learned counsel for the applicant reiterated his submissions in chief on reason for termination and exhibits supporting that reason. He maintained that respondent was terminated after considering allegations of poor performance that were proved and after adherence to procedural fairness. Learned counsel submitted further that, there is no proof that members of the Executive Committee contributed to late submissions and that, exhibit D15 does not support respondent's submissions.

Regarding sickness of the respondent as a ground for poor performance, he submitted that, sickness of the respondent does not feature in the CMA award. He added that, sickness did not cover the whole period because it covered only isolated incidences and that is normal. Mr. Mseke argued further that, DW1 did not contribute to respondent's poor

performance and added that, exhibit D43 was not one of the claims for delay.

On availability of standards, Mr. Mseke submitted that, job description (exhibit D6) spells out the level and quality of the respondent. He went on that, in exhibit D63 respondent admitted that she was not performing. He added that, respondent was the custodian of all documents hence, she was aware of what she was supposed to do if she was aggrieved with the rating. Counsel submitted further that, there was no evidence proving that training in South Africa was cut shot.

On payment of bonus, Mr. Mseke submitted that, bonus was not paid based on performance of the respondent, but it was based on overall performance of the bank namely the applicant. He argued further that, there is no policy that the non-performers will not be paid bonus. On appeal to the Board of Directors, counsel for the applicant reiterated his submission in chief that, respondent chose to appeal to the Board of Directors. On remedies awarded to the respondent, Mr. Mseke submitted that, respondent was awarded 18 months in lieu of reinstatement.

I have carefully examined evidence of the parties in the CMA record and considered submissions made in this application and find that issues to

be answered by this court are (i) whether there was valid reason for termination that is to say; whether termination was substantively fair, (ii) whether procedures for termination were adhered to and (iii) to what relief(s) are the parties entitled to.

In disposing this application, I will start with the first issue namely, whether there was valid reason for termination of employment of the respondent. It was testified by Kelvin Wingfield (DW1), Wilmot Ishengoma (DW2) and Stephen Kisanko (DW4) that, respondent was terminated due to poor performance. Charles Rwechungura(DW3) not being an employee of the applicant did not show in his evidence, that respondent's performance was poor. DW3 only testified on what he believes to be the quality and standard of the Company secretary. In fact, termination letter (exhibit D68) shows that, on 31st August 2021, employment of the respondent was terminated due to poor performance. It is on record that, in the process to terminate employment of the respondent for poor performance, on 26th July 2021, applicant served the respondent with the charge sheet and notification to attend poor performance hearing (exhibit D64).

I should point from the start that, poor performance is one of the incapacities that may lead to termination of employment of an employee as provided for under Rule 15(1) of the Employment and Labour Relations (Code of Good practice) Rules, GN. No. 42 of 2007. In order poor performance to be a fair reason for termination of employment of the employee, the employer, arbitrator or the judge shall consider the following conditions namely, (i) there must be a standard of performance that the employee failed to meet, (iii) the standard must be reasonable, (iii) the said standard must be known to the employee prior termination, (iv) the reason why the employee failed to meet the standard and (v) the employee must have been afforded a fair opportunity to meet the performance standard as provided by Rule 16 and 17(1) of GN. No. 42 of 2007(supra). The said Rules provides: -

*"16(1) **It is important in determining the fairness of termination for poor performance, that the performance standard is not only reasonable but is also known to the employees**.*

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) ***Whether the performance standard standards are reasonable****;*

(d) ***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 is mine).

I should point out that, the above conditions are cumulative, and that the employer cannot just fulfil one condition and proceed to terminate an employee. Therefore, all conditions must be met and proved by the employer that they were complied with.

Apart from the above quoted Rules, Guideline 6(6) of the Guidelines for disciplinary, Incapacity and Incompatibility Policy and Procedures issued under the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 provides conditions that should be complied with by the employer. The said Guideline 6(6) provides: -

"6(6) When considering whether a termination for incapacity in respect of poor work performance is fair, management should consider the following-

(a) Whether or not the employee failed to meet a performance standard;

(b) If the employee failed to meet the required standard, whether or not-

(i) the employee was aware or ought to have been aware, of the standard;

(ii) the performance standards are reasonable;

(iii) the employee was given a reasonable opportunity to meet the standard and the reason for the failure to meet the standard; and

(iv) the dismissal was the appropriate sanction."

In the application at hand, I will be guided by the above quoted provisions of the law in determining whether applicant had valid reason to terminate employment of the respondent and whether she complied with the above quoted provisions relating to fair reason for termination of employment for poor work performance.

Termination of employment for poor work performance has been a subject of discussions in various cases in the High Court in our jurisdiction but there is no case that has discussed the above conditions. Unfortunately, I did not come across with even a single case of the Court of Appeal fair reason for poor work performance. Facing that reality and being aware that, the courts in our jurisdiction can borrow a leaf and inspirational from other jurisdiction when it finds that the area is novel as it was held by the Court of Appeal in the case of ***Attorney General vs. Mugesi Anthony and 2 others***, Criminal Appeal No. 220 of 2011 (CAT)

unreported, I came across with the case of ***Gold Fields Mining South Africa (Pty) Limited (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*** (JA 2/2012) [2013] ZALAC 5, the Labour Appeal Court of South Africa wherein the Court had an advantage to discuss as to what the employer is required to prove in order termination for poor work performance to be fair. In ***Kloof's case*** (supra, the Labour Appeal Court of South Africa held:-

> *"In order to find that an employee is guilty of poor performance and consider dismissal as an appropriate sanction for such conduct,* ***the employer is required to prove that the employee did not meet existing and known performance standards****; that* ***the failure to meet the expected standard of performance is serious****; and that* ***the employee was given sufficient training, guidance, support, time or counselling to improve his or her performance but could not perform in terms of the expected standards****. Furthermore, the* ***employer should be able to demonstrate that the failure to meet the standard of performance required is due to the employee's inability to do so and not due to factors that are outside the employee's control."*** (Emphasis is mine).

In the application at hand, none of the witnesses for the applicant namely Kelvin Wingfield (DW1), Wilmot Ishengoma (DW2), Charles Rwechungura (DW3) and Stephen Kisanko (DW4) testified that applicant had a performance standard, that respondent was aware of the said standard and in her performance, but she failed to meet it, that the

standard was reasonable, and that the dismissal was the appropriate sanction. In short, there is no scintilla of evidence to prove that applicant complied with the provisions of Rule 17(1) of GN. No. 42 of 2007 (supra).

Strangely as it is, Charles Rwechungura (DW3), being a seasoned advocate, only testified on what he used to perform as company secretary based on his experience when he was a Company Secretary of TIB between 1985 and 1990 before leaving Public Service and open his law firm. DW3 wanted the arbitrator to take his previous performance as a Company Secretary to be a performance standard of any Company Secretary including the respondent. That evidence by any means, cannot be accepted for various reasons. One; none of his minutes or performance when he was a Company Secretary was tendered to enable both the arbitrator and this court to assess that they were free from typographical, grammatical errors or they contained details and were timely submitted. Two; his performance, even if assumed that was accurate, timely submitted and contained decisions, cannot be performance standards of the applicant because, respondent is not alleged to have not complied with DW3's standards but that of the applicant. Three; in his evidence, DW3 did not state that the standard he was mentioning applies also to the applicant and that, he once worked with the applicant. Four; the law requires the

employer to have the performance standard and not DW3 who, is not the employer of the respondent. In short, there is no standard that respondent failed to meet in her performance hence termination was unfair for want of reason.

It was submitted by Mr. Mseke, learned counsel for the applicant that, job description (exhibit D6) spells out the level and quality of the respondent hence it served as the standard. With due respect, job description cannot be regarded as the standard for an employee to perform his or her duties, rather, it describes duties of the employee. The law is clear that, for the employee to be terminated for poor work performance, the employee must have failed to meet the performance standard and not the job description. Had the drafter of the law intended to mean the job description, it could have stated so in a plain language.

It is my view that, since there is no evidence to prove that there was a reasonable known performance standard that the respondent failed to meet and considering that the above-mentioned conditions for termination based on poor work performance are cumulative, I hold that termination of employment of the respondent was unfair for want of reason.

As a matter of completeness, I will discuss the allegations that was put forward by the applicant against the respondent as reasons for termination, though, that may cause this judgment unnecessarily long.

It was evidence of Stephen Kisanko (DW4) that, on 26th July 2021, applicant served the respondent with the charge sheet and notification to attend poor performance hearing (exhibit D64) containing two counts namely (i) unacceptable frequencies of missed timelines (late submissions) and (ii) recurring and unacceptable level of poor quality of deliverables. It was was further evidence of DW4 that, hearing for poor performance was conducted on 28th July 2021 at 14:00hrs. DW4 testified further that, in the said hearing, respondent was found guilty and appealed to the Board of Directors, but her appeal was dismissed leading to termination of employment due to poor working performance.

The issue is whether, applicant adduced evidence to prove those allegations against the respondent for the court to hold that applicant had valid reason to terminate employment of the respondent.

In answering that issue, I will start with the first count. This count relates to unacceptable frequencies of missed timeline/ late submissions. Particulars of this count reads: -

"It is alleged that while performing your duties as a Company Secretary of Stanbic Bank Tanzania Limited, your submissions have continuously been late and beyond the deadline, despite several reminders from the Chief Executive. Delays in submission has an impact on the effectiveness of other processes and decisions that are dependent on the submissions."

Evidence that was relied on by the applicant to prove this count is that of Kelvin Wingfield (DW1), who was the Chief Executive Officer (CEO) of the applicant and the line manager of the respondent. It was evidence of DW1 that, respondent failed to attend certain meetings without prior apology or subsequent explanation, missed deadlines on several issues, was regularly not adhering to quality and timing of reporting, was submitting reports late and without execuse meaning that many minutes in key documents were not produced on time. DW1 testified further that, respondent lacked punctuality to important issue, failed to response to queries of legal nature and lacked leadership. DW1 testified further that, several tasks that were under respondent's responsibility were not delivered within time and that, output of the respondent was not reflecting a required level of a senior manager.

In her evidence, respondent (PW1) testified that, late submissions was contributed by many factors including her sickness, delay of the Executive Committee members to review the minutes, delay by DW1 to

give comment or not to give proper directive as to what should be altered, absence of the assistance because her assistant was working with DW1 without her (PW1's)knowledge, increase of workload after establishment of a new committee of the Board of Directors etc. I should point out that, evidence of the respondent on reasons for late submissions were not shaken by the applicant. More so, DW1 while under cross examination, admitted that, had he not taken long time to review exhibit D43, the said exhibit would have been submitted timely by the respondent. It is my opinion that, based on evidence of the parties, the first allegation was not proved.

The second count that respondent was facing is recurring and unacceptable level of poor quality of deliverables. Particulars of this count reads: -

> *"It is alleged that while performing your duties as a Company Secretary of Stanbic Bank Tanzania Limited, your submissions (reports, minutes, letters etc.) have in repeated instances been of poor quality to an extent that is unacceptable for your level of qualification and expectation. Your submissions have generally contained unacceptable levels of grammatical errors, typographical errors, as well as omissions of important content. The poor quality of submissions have necessitated reworks which unnecessarily consumed time of the reviewers, resulting in inefficiencies."*

In the bid to prove this count, applicant fronted DW1 as her star witness. In his evidence Kelvin Wingfield (DW1) tendered an email he wrote to the respondent on 7th September 2020 (exhibit D34), an email he wrote on 30th August 2020 22:32 to the respondent (exhibit D35) and minutes submitted by the respondent relating to the 104th Board meeting (exhibit D36) to prove the allegation against respondent relating to poor quality or doing work without accuracy and completeness. It was further evidence of DW1 that, these exhibits contain typographical errors and lacked substance that required himself (DW1) to make some changes in assisting the respondent. It was also evidence of DW1 that, in exhibit D36 relating to 104th Board of Directors' Meeting, decision and deliberations directed by the Board chair was missing.

I should point out that, exhibits D34 and D35 being emails authored by DW1 has nothing to do with the alleged poor work performance of the respondent. Those exhibits do not show typographical or grammatical errors alleged to have been committed by the respondent. I should point out that, though proceedings shows that DW1 prayed to tender minutes of the 104th Board of Directors' meeting as exhibit D36, what was marked as exhibit D36 is an email written by DW1 to the respondent on 07th

September 2020. The said email is attached with minutes of the 101st meeting of the Board of Directors and not the 104th minutes of the Board of Directors for the court to hold that it was just an oversight by the arbitrator in marking this exhibit. I should also point out that, exhibit D36 was admitted as a single document. I therefore hold that, allegations by the applicant based on the aforementioned exhibits failed to prove poor work performance of the respondent.

DW1 tendered minutes of employee/line manager performance feedback session for the year 2020 (exhibit D23) to show that the Board of Directors' minutes that were recorded by the respondent had typographical errors on critical decisions, that; critical decisions were missing and that; it required spending a lot of time to review. DW1 testified further that, on 8th December 2020, respondent admitted in the meeting that her performance was not where it was supposed to be.

I have examined exhibit D23 and find that it was an assessment session in respect of respondent's performance. The said session was attended by DW1, who was the assessor, Oduntan Oyetunde, senior manager, and Eutropia Vegula, HC, all being employees of the applicant on one hand, and respondent (PW1) the one who was assessed, on the other.

In the said exhibit D23, the parties did not agree on many issues, as a result, it was concluded that an independent inquiry panel will be suitable forum to listen to both parties. The said exhibit D23 reads in part: -

> *"…It was hence agreed by Kelvin, the CE who is the line manager; Hellen the Company Secretary who is the employee and Eutropia, the HC Head who is the secretary; that given varied views between the line manager and the employee* ***an independent performance inquiry panel will be a suitable forum to listen to both parties and determine appropriate way forward****."* (Emphasis is mine).

It is my opinion that, had the respondent admitted the allegations relating to grammatical and typographical errors in minutes of the Board of Directors and or poor work performance and the whole rating process, the parties would have not considered an option of having an independent performance inquiry to hear both DW1 and respondent (PW1). It is my view therefore that, exhibit D23 did not prove admission of the respondent to the alleged poor work performance. It is unfortunately that, applicant opted to read and capitalize half of the sentence in exhibit D23 to show that respondent admitted that her performance was not where it was supposed to be and left what I have quoted hereinabove.

DW1 tendered email dated 26th November 2021 11:11 that respondent sent to him (DW1) relating to the 102nd Board of Directors'

meeting (exhibit D38) and stated that, respondent indicated that time of the meeting was 8:30 hence confused members. DW1 testified further that, respondent apologized and issued another notice (exhibit D39). He also testified that, there are basic errors in in the minutes of the 102nd meeting of the Board of Directors (exhibit D41) such as, missing attendees and decision, as a result, he (DW1), checked the minutes and asked respondent to re-look at the said minutes before he (DW1) reviewed for the second time and that, respondent complied. DW1 further testified that, on 27th January 2021 respondent wrote an email (exh D42) attached with minutes of 102nd meeting of the Board of Directors containing errors in terms of punctuation, spelling and grammatical errors.

I have examined the abovementioned exhibits and find that, D38 and D39 are all emails dated 26th November 2021 11:11 and 14th December 2020 22:54 respectively and that, they do not support what DW1 testified. In my careful examination of the CMA record, I have found that DW1 prayed to tender the said email and not the above-mentioned minutes. Further to that, exhibit D41 is an email exchange between DW1, and respondent dated 15th December 2020 8:14:03 PM and 16th December 2020 09:17 respectively, and that, exhibit 42 is an email from the respondent to DW1 dated 27th January 2021 21:27. It is clear in the

applicant's evidence that, DW1 prayed to tender an email (exhibit D42) and not the minutes that was attached to the said exhibit. That being the case, I safely conclude that, exhibits D39, D39, D41 and D42 has nothing to do with missing attendees and decisions, or errors in terms of punctuation, spelling and or gramma. Therefore, these exhibits do not prove the alleged poor work performance of the respondent.

DW1 tendered an email dated 14th February 2021 he wrote to the respondent relating to minutes of 102nd Board meeting, minutes of the said 102nd meeting as exhibit D43 collectively and stated that, errors in the said minutes are that, respondent indicated that the meeting was held on 2nd December 2019 instead of 2nd December 2020. He testified further that, the decisions of the Board members were missing, title of the executive members was omitted and that, on growth projection respondent wrote positive 5.2 instead of negative 5.2.

I have examined exhibit D43 collectively and find that, in an email dated 14 February 2021 12:58 on the title, DW1 wrote "**Draft Minutes of the 102nd Board Meeting for Review by the Chairman**". It is my view that there is grammatical error in that heading. I have read the minutes of the said 102nd Board meeting and find that it shows that, the meeting was held on 2nd December 2020 contrary to the allegation by DW1

that respondent indicated that the meeting was held on 2nd December 2019. Again, the allegation that on growth projection respondent indicated positive 5.2 instead of negative 5.2 is not valid. The said minutes shows growth projection of negative 5.2. contrary to what was alleged by DW1.

DW1 further tendered minutes of Board of Directors' meeting No. 103 and an email he wrote to the respondent on 23rd April 2021 08:32 as exhibit D44 collectively and stated that, the said minutes contains grammatical errors such as, use of capital letters to describe names and places and lacked details. DW1 also tendered an email dated 17th June 2021 written by the respondent and the minutes of the 104th meeting of the Board of Directors in relation to matters arising from the 104th meeting (exhibit D45) and stated that, the said minutes contains errors. He further tendered an email he wrote to the respondent on 18th June 2021 81:21 and minutes of the 104th meeting of the Board (exhibit D46) and state that, the said minutes contains errors on capitals or small letters and several errors on proper understanding of the context. He also testified that; key decisions of the Board of Directors were not captured. Not only that, but also, DW1 tendered an email of the respondent dated 26th January 2021 22:40 in which respondent was asking DW1 to review minutes of the 13th extraordinary meeting so that she(respondent) can share the said minutes

with the Board Chairman (exhibit D47) and stated that, the said minutes contains grammatical errors on sentences and some contexts were missing.

I have examined exhibit D44 and find that it is true that respondent wrote "**East africa** instead of East Africa and "**sub-sahara africa**". In reviewing the said minutes, DW1 wrote "**sub-sahara Africa**". It is my view that, in reviewing, DW1 wrote **sub-sahara Africa** incorrectly and that, DW1 has been caught by the same web of grammatical errors. That is just a single document that I have examined and find that work of DW1 also contains grammatical errors but DW1 has not been terminated for poor work performance based on grammatical errors.

On lack of details, I have examined exhibit D44 and find that the said minutes contains details though, may not be to the satisfactory of DW1. I have noted that, here and there, there was difference in choice of words and writing style between DW1 and the respondent, but the meaning remained the same. In my opinion, that cannot be regarded as lack of details sufficiently to be a ground for termination for poor work performance.

I should point out that, in his evidence, DW1 did not specify the alleged errors in exhibit D45. It is my opinion that, it was not enough for DW1 just to state that there are errors in the said exhibit and leave it to

the arbitrator or the court to find those errors. I have read exhibits D46 and D47 and it is my view that, the alleged errors in these exhibits are not grave to warrant applicant to raise eye blow and terminate the respondent. Some of the issues complained of by the applicants are choice of words. For example, respondent wrote "**...subject to independent validation by internal audit which began in April 2021**". On review, DW1 wrote **"...subject to independent validation by internal audit which commended in April 2021**." It is my view that, here the problem is choice of words because, synonyms of begin is commence but applicant took that as an issue of poor performance. I have examined evidence of the applicant and find that, there is no logic on some of the errors alleged committed by the respondent. I therefore agree with the respondent who testified that, the problem is choice of words and writing style between herself and DW1.

When cross examined in relation to exhibit D55, DW1 stated that, respondent uploaded a wrong document which stated "**Zambia**" instead of "**Tanzania**" and that, she lacked the details and attention. When he was cross examined in relation to exhibit D43 that was authored by himself, DW1 admitted that he apologized for attaching a wrong document and asked respondent to ignore it. He further admitted that, it happens that

any person may attach a wrong version of a document. When cross examined on exhibit D49, DW1 stated that there were grammatical errors and that grammatical errors he referred to are, gaps and lack of "commas" and "apostrophe. When DW2 was cross examined on exhibit D62, he stated that, the said exhibit was the award letter sent by procurement department and that respondent was blamed for a document that came from the procurement department and further that, procurement department does not report to the company secretary.

I have examined minutes of the 104th meeting of the Board of Directors and find that, at the time of reviewing the said minutes, DW1 wrote: -

> *"As an industry a meeting with the Governor was planned for the end of May 2021 in Dodoma to discuss the directives and other industry related issues.* "

It is my view that, the quoted sentence has grammatical errors. But DW1 has not been terminated though his work also contains grammatical errors. I may say that, applicant was selective in terminating respondent based on the aforementioned grammatical errors. I am of that view because, on 14th July 2017, Rabina Masanja, Senior Human Capital Business partner wrote a letter to the Managing Director AAR Hospital exhibit D11 as hereunder: -

RE: MEDICAL CHECKUP FOR HELLEN MAKANZA

Hellen Makanza is an employee of Stanbic Bank Tanzania Limited. We are referring ***them*** *to your hospital for medical* ***check up*** *as part of internal procedures.*

Kindly assist ***them*** *to be attended in accordance with the procedures, and kindly send us the medical report in a sealed envelope addressed to the Head, Human Capita.*

Yours sincerely

Sdg

Rabina Masanja

Senior Human Capital Business Partner" (Emphasis is mine).

It is my view that, there are grammatical errors in the above quoted letter. Despite that, there is no evidence to show that a similar measure was taken by the applicant against the said Rabina Masanja. In my view, if applicant has a standard that allows termination of employment of employees based on grammatical errors as one of poor work performance, of which evidence is wanting, then, that standard should have also been applied to DW1 and Rabina Masanja. Otherwise, that standard, is unreasonable for being selective and in violation of 17(1)(c) of GN. No. 42 of 2007 (supra).

I should point out in a passing that, I have read the grounds of revision in this application as stated in the affidavit of Eric Rwelamira, the Head of the Legal Department and find that, there are grammatical errors. I should

make it clear that, the said affidavit is not evidence in this application, and I have not used those grammatical errors to make decision in this application. As pointed hereinabove, I have decided to reproduce those grounds so that they may speak on their own and leave it to each one of us to see those grammatical errors. In fact, those grounds passed through the hands of Mr. Mseke, learned counsel for the applicant, who, incidentally, represented the applicant at CMA and in hearing of this application. In fact, during hearing of this application, Mr. Mseke, learned counsel for the applicant, conceded that there are grammatical errors in the grounds of revision filed by the applicant. I should point out that, I have only considered grammatical errors in exhibits that were tendered by the applicant to draw inference that applicant was selective, because, other employees including DW1 whose work contained grammatical or typographical errors were not terminated. Based on exhibits that were tendered on behalf of the applicant, I have concluded that, termination of the respondent was selective and unreasonable. It doesn't portend well that, one employee was terminated due to the alleged typographical and grammatical errors but others being left free. In my view, that is discrimination. Applicant was supposed to treat equal all employees if there was a standard requiring employees' works not to contain grammatical or

typographical errors, of which, as I have pointed hereinabove, the said standard does not exist.

My conclusion that termination of employment of the respondent was selective is fortified by unshaken evidence of the respondent (PW1) that, on 17th May 2021, the Board of Directors, directed DW1 to recruit another employee as Company Secretary, the position respondent was holding as respondent's evidence was supported by exhibit P7. In fact, the extract of the minutes of 15th Extraordinary meeting of the Board of Directors that was held virtually on Microsoft Teams on 17th May 2021 starting 09Hrs (exhibit P7) reads in part: -

> *"Following the discussion by the board of directors regarding the performance evaluation of the company secretary*
>
> ***THE BOARD RESOLVED***
>
> 1. *THAT the performance of the company secretary was not at the required standard and had not been for some time. This was also reflected in the board rating of the company secretary's performance.*
> 2. *THAT the Chief Executive should provide this feedback to the company secretary.*
> 3. *THAT* ***the company secretary was to be replaced****; and*
> 4. *THAT* ***the chief executive officer was to proceed with the recruitment process to secure suitable candidate for the role of the company secretary for consideration by the board****."* (Emphasis is mine).

I should point out that, exhibit P7 was admitted without objection. When testifying both in chief and cross examination, respondent (PW1) stated that, she attended the poor performance hearing (exhibit D63) on 28th July 2021 while she had already been terminated by the Board of Directors. I entirely agree with that evidence because the decision by the Board of Directors to terminate respondent's employment was made on 17th May 2021. Evidence shows that, respondent was served with the charge sheet and notification to attend poor performance hearing on 9th July 2021 (exhibit P8) containing five counts namely (i) grammatical and typographical errors, (ii) lack of attention to details, (iii) omissions, (iv) accountability and ownership and (v) late submissions. Exhibit P8 shows further that, hearing was expected to be conducted on 13th July 2021 at 13:00hrs to 15:00hrs via Microsoft Team but it was not. Instead, on 26th July 2021, applicant served the respondent with another charge sheet and notification to attend poor performance hearing (exhibit D64) containing two counts namely, (i) unacceptable frequencies of missed timeline/late submissions and (ii) recuring and unacceptable level of poor quality of deliverables as quoted hereinabove and hearing was conducted on 28th July 2021 as evidence by the hearing form and minutes for poor performance hearing (exhibit D63). In my view, the decision to terminate

employment of the applicant was made on 17th May 2021 prior to initiation of the charges. I totally agree with the arbitrator that, both the charges and notification to attend the poor performance hearing and minutes thereof (exhibits P8, D64 and D63 respectively) and the termination letter dated 31st August 2021 (exhibit D68) were just rubber-stamping the decision made on 17th May 2021 by the Board of Directors to terminate employment of the respondent.

It was submitted by counsel for the applicant that the Board of Directors was also managing performance of the respondent and that, on 17th May 2021, in an Extra Ordinary Board Meeting, it was opined that respondent be replaced. It is my view that, since the Board of Directors was also managing performance of the respondent and on 17th May 2021, the said Board of Directors issued a resolution that another person be employed to replace the respondent, then, the Board of Directors terminated the respondent without affording him right to be heard. In short, the Board of Directors violated constitutional rights of the respondent. In fact, DW1 and whoever sate in the poor performance hearing was just implementing that order. In other words, a decision to terminate respondent was reached on 17th May 2021 in violation of natural justice principles. It has been held several times by this court and the Court

of Appeal that a decision reached in violation of natural justice principles cannot be left to stand. See the case of ***Abbas Sherally & Another vs Abdul S. H. M. Fazalboy***, Civil Application No. 33 of 2002, ***Danny Shasha vs Samson Masoro & Others*** (Civil Appeal 298 of 2020) [2021] TZCA 653, ***Margwe error & Others vs Moshi Bahalulu*** (Civil Appeal 111 of 2014) [2015] TZCA 282, ***Tabu Ramadhani Mattaka vs Fauzia Haruni Saidi Mgaya*** (Civil Appeal 456 of 2020) [2022] TZCA 84, ***Alpitour World Hotels & Resorts S.P.A. & Others vs Kiwengwa Ltd*** (Civil Application 3 of 2012) [2012] TZCA 138, ***North Mara Gold Mine Limited vs Isaac Sultan*** (Civil Appeal 458 of 2020) [2021] TZCA 755, ***MANTRAC Tanzania Limited vs Raymond Costa*** (Civil Appeal 90 of 2018) [2022] TZCA 75 and ***Board of Directors Centre for foreign Relations vs Hassan Ally Hassan*** (Revision Application 434 of 2022) [2023] TZHCLD 1268 to mention but a few. For all what I have explained hereinabove, I hold that termination was unfair for want of reason.

It was submitted by counsel for the respondent that respondent was not poorly preforming which is why she was paid bonus. Counsel for the applicant countered these submissions arguing that bonus was not paid based on performance of the respondent, rather, it was based on overall performance of the bank and that, there is no policy that the non-

performers will not be paid bonus. With due respect to counsel for the applicant, submissions that performance was based on overall performance of the bank and that there is no policy that the non-performance should not be paid bonus is not supported by evidence. As such, that is submissions from the bar that have no eventual value. See the case ***Rosemary Stella Chambejairo vs David Kitundu Jairo***, Civil Reference 6 of 2018) [2021] TZCA 442, ***Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others***, Civil Appeal No. 147 of 2006, ***A. Nkini & Associates Limited vs National Housing Corporation,*** Civil Appeal No.72 of 2015) [2021] TZCA 564, ***Shadrack Balinago vs Fikir Mohamed @ Hamza & Others***, Civil Application No. 25 of 2019 [2021] TZCA 45 to mention but a few. Since evidence of the respondent in relation to payment of bonus was not controverted, I hold that performance of the respondent was good.

On procedural fairness, for the employer to terminate employment of an employee based on poor performance, must comply with the provisions of Rule 18(1), (2), (3), (4), (5)(a) and (b), (6), (7), (8) and (9) of GN. No. 42 of 2007(supra). In terms of Rule 18(1), (2), (3), (4), (5)(a) and (b), (6), (7), (8) and (9) of GN. No. 42 of 2007(supra), for termination of

employment due to poor work performance to be fair procedurally, the employer must (i) conduct investigate the reason for poor work performance and how it was caused by the employee, (ii) give appropriate guidance, instruction or train an employee, if necessary, (iii) give an employee reasonable time to improve depending on the nature of the job, extent of poor performance, status of employee, length of service and employee's past performance record save for employees in managerial or senior position or where the degree of professional skill is high that potential smallest departure from that standard are so serious even on isolated instance, (iv) warn the employee for poor performance that employment may be terminated if there is no improvement, (v) call a meeting with an employee who will be allowed to have a fellow employee or trade union representative to provide assistance, (vi) at the meeting in (v), the employer must outline reasons for action to be taken and allow the employee and /or representative to make representation, (vii) employer must consider representation made by the employee and give reasons if not convinced with the representation and (viii) must communicate the outcome to the employee in writing with brief reasons.

In addition to the foregoing, guideline 6(1), (2), (3), (4) and (5) of the Guideline for disciplinary, Incapacity and incompatibility Policy and

Procedure issued under GN. No. 42 of 2007 (supra) provides the procedure to be followed by the employer prior terminating employment of the employee for poor work performance. The said Guidelines provides: -

> *"6(1) In cases of alleged poor work performance by an employee, a Manager should* ***consult the employee to identify and analyze the problem****. The employee should be given an opportunity to account for the poor work performance.*
>
> *(2) Where the Manager believes that it is a matter constituting misconduct, it should be dealt with in terms of the procedures outlined in the Rules.*
>
> *(3) Where the Manager believes it is a matter constituting incapacity and* ***counseling between management and the employee should take place in an attempt to rectify the problem****. The process include appropriate evaluation, training, instruction, guidance or counseling and should provide for a reasonable period of time for improvement.*
>
> *(4)* ***Where the employee continues to perform unsatisfactorily, the employer should warn the employee that the employment may be terminated if there is no improvement****. An opportunity to improve may be dispensed with if-*
>
> *(a) the employee is a manager or senior employee whose knowledge and experience qualify him or her to judge whether he or she meets the standards set by the employer; or*
>
> *(b) the degree of professional skill that is required is so high that the potential consequences of the smallest departure from that high standard are serious that even an isolated instance of failure to meet the standard may justify termination.*
>
> *(5)* ***Prior to decision making to terminate the employment of an employee for poor work performance management should call a***

meeting with the employee, *who should be allowed to have a fellow employee or trade union representative present to provide assistance. At the meeting management should provide reasons for the action to be taken and allow the employee and /or the representative to make representations, before making a decision. Management should consider all representations made and if these are not accepted, explain why. The outcome of the meeting should be communicated to the employee in wring with brief reasons."* (Emphasis is mine).

I should point out that the same procedure is provided by Rule 18(1), (2), (3), (4), (5), (6), (7), (8) and (9) of GN. No. 42 of 2007(supra).

In the application at hand, no meeting was held to identify and analyze the problem as provided for under Guideline 6(1) above, rather, a poor performance hearing by the committee. It is my view that the said meeting was not identifying and analyzing the problem rather, was finding errors and justification for termination of employment of the respondent. More so, no warning was issued to the respondent in compliance with Guideline 6(4) above.

In terms of Rule 18(1) of GN. No. 42 of 2007(supra), the employer must investigate for unsatisfactory performance and the extent to which is caused by the employee. It was argued by counsel for the applicant that that, Rule 18(1) of GN. No. 42 of 2007(supra) does not state that employer is bound to conduct investigation before terminating an employee for poor

performance, rather, the Rule requires only the employer to investigate reasons for unsatisfactory performance and reveal extent to which it caused the employee to perform poorly. It was further submissions by counsel for the applicant that exhibits D22, D8, D9, D10, D11, D12 is investigation hence Rule 18(1) of GN. No. 42 of 2007(supra) was complied with. With due respect to counsel for the applicant, Rule 18(1) of GN. No. 42 of 2007 requires the employer to investigate the reasons for unsatisfactory performance and the outcome thereof must disclose the extent to which was caused by the employee. It is my view that investigation is mandatory to help the employer to know whether poor performance was due to misconduct of the employee, or it was due to poor performance in compliance with Guideline 6(2) and (3) quoted hereinabove. It is my view that if poor work performance is due to misconduct, then, the course to be take cannot be the same as the one to poor work performance due to incapacity.

In the application at hand, an email written by Cockeril, Ken(Tanzania) on 26th July 2016 06:31PM and the respondent on the same date (exhibit D8), a letter dated 19th August 2016 sent to Hellen(respondent) by Kenrick Cockeril titled "concerns regarding your apparent

state and probable incapacity due to ill-health" (exhibit D9), minutes of a meeting held on 19th August 2016 between Kenrick Cockerill (chief Executive) who was the chairperson and Stephen Kisanko(Senior Human Capital Business partner) who was the secretary on one hand, and Hellen Makanza(Company secretary), the respondent on the other(exhibit D10), cannot be regarded as investigation so to speak. More so, a letter to the Managing Director AAR Hospital for medical checkup of the respondent (exhibit D11), medical examination report dated 4th August 2017 (exhibit D12) or an employee information and value-based questioner (exhibit D22), cannot be an investigation envisaged under Rule 18(1) of GN. No. 42 of 2007 (supra). In short, applicant did not comply with the provision of Rule 18(1) of GN. No. 42 of 2007 (supra) on procedural fairness. I therefore agree with submissions made by Ms. Bahati, learned counsel for the respondent that termination was unfair procedurally.

I have examined the CMA record and find that; applicant did not adduce evidence to show that she warned respondent in terms of Rule 18(4) of GN. No. 42 of 2007 (supra) or Guideline 6(4) of the Guidelines issued under GN. No. 42 of 2007(supra) that her employment may be terminated due to poor performance. It is my considered opinion that,

since those provisions were not complied with, termination was unfair procedurally.

I have also examine the hearing form and minutes of the poor performance hearing (exhibit D63) and find that, when Kevin Wingfield(DW1) was testifying in the said poor performance hearing made reference to documents relating to past years' performance of the respondent and that, the latter raised an objection based on retention time of those documents in her file arguing that they were supposed to be retained only for one year according to legal and regulatory requirements. Instead of the witness namely Kevin Wingfield to respond, Mrs. Eutropia Vegula, the secretary to the poor performance hearing responded that the documents were supposed to be kept for six years. In my view, that was not the role of the said secretary. If anything, that was supposed to be left to the chairperson to decide. That was unfair procedurally, meaning that the poor performance hearing committee was biased.

It was submitted by counsel for the applicant that respondent was a senior manager in the management hence she was not entitled to be put in performance program to improve performance understandably, relying on the provisions of Rule 18(5)(a) and (b) of GN. No. 42 of 2007 (supra) and

Guideline 6(4)(a) and (b) supra. In my view, even senior managers need training depending on the cause of poor performance. For example, if in the investigation it is found that poor work performance of the senior manager is because of change of technology or failure of being kept abreast with new issues, it is the duty of the employer to train the employee and not to rely on those exceptions and terminate the employee. In fact, the Labour Court Appeal of South Africa had this to say in the case of ***Palace Engineering (Pty) Ltd v Ngcobo and Others*** (LAC) [2014] ZALAC 7; [2014] 6 BLLR 557 (LAC); (2014) 35 ILJ 1971 (LAC) (5 February 2014):-

> *"Although a senior employee is indeed expected to be able to assess whether he is performing according to standard and accordingly does not need the degree of regulation or training that lower skilled employees require in order to perform their functions, an employer is not absolved from providing such an employee with resources that are essential for the achievement of the required standard or set targets."*

I associate myself with that reasoning.

It was submitted by counsel for the applicant that respondent was trained in South Africa and Nigeria inter-alia on how to record minutes. I have read evidence of the respondent (PW1) and find that she stated that the training in South Africa was cut short. That evidence was not shaken

under cross examination. That being the position, it was not proved by the applicant that respondent was trained in the areas complained and that she is untrainable. As held hereinabove, it was the duty of the applicant to keep respondent abreast on how applicant wanted minutes to be recorded.

The arbitrator having found that termination was unfair both substantively and procedurally, awarded respondent to be paid TZS 374,295,088/= being salary compensation for 20 months and TZS 336,865,580/= being 18 months salary remuneration from the date of termination to the date of termination. It was argued by counsel for the applicant that, the arbitrator was supposed to award the respondent TZS 374,295,088/= being 20 months salaries compensation and TZS 336,865,580/= being 18 months salary remuneration from the date of termination to the date of the award disjunctively and not conjunctively. It was further submitted by counsel for the applicant that, there is no justification for the arbitrator to award respondent 20 months' salary compensation instead of 12 months salaries compensation.

I have read the award and find that, in awarding respondent TZS 374,295,088/= being 20 months salaries compensation, arbitrator considered 15 years period that respondent worked with the applicant,

nature of banking business and the type of allegations that were put by the applicant against the respondent namely poor performance, that would have caused respondent not to secure employment. I therefore conclude that it is not true that the arbitrator did not give justification for awarding respondent 20 months salaries compensation. I therefore find the complaint that the arbitrator did not give reasons in awarding respondent 20 months' salary compensation unmerited.

In awarding respondent TZS 336,865,580/= being 18 months salary remuneration from the date of termination to the date of the award, arbitrator relied on the provisions of section 40(2) of Cap. 366 R.E. 2019(supra) that respondent ought to be reinstated without loss of remuneration but it was practicable impossible due to passage of 18 months from the date of termination. It is my view that, this complaint has merit. In the CMA F1, respondent prayed to be reinstated and or be paid TZS 11,789,439,037.26 as compensation. The relief of reinstatement is provided for under section 40(1)(a) of Cap. 366 R.E. 2019(supra) while the relief of compensation is under section 40(1)(c) of the same Act. These reliefs are in alternative and cannot awarded jointly. In the case of ***National Microfinance Bank vs Leila Mringo & Others*** (Civil Appeal

30 of 2018) [2020] TZCA 240 and ***National Microfinance Bank vs Victor Modest Banda*** (Civil Appeal 29 of 2018) [2020] TZCA 35, ***Charles Mwita Siaga vs National Microfinance Bank Plc*** (Criminal Appeal 112 of 2017) [2022] TZCA 227 the Court of Appeal had an advantage of discussing whether reliefs under section 40(1)(a), (b) and (c) are awardable conjunctively or disjunctively. In all these cases, the Court of Appeal held that those reliefs are awardable disjunctively. For example, in ***Leila Mringo's case*** (supra), the Court of Appeal held: -

> *"We are settled in our mind that reinstatement or re-engagement or compensation in subsection (1)(a), (b) and (c) of section 40 of ELRA must be read disjunctively. The "or" in the subsection is not conjunctive, it is disjunctive. That is perhaps why, in subsection (3) of the same section, it is provided that if the employer does not wish to reinstate or re-engage, then compensation should be paid…"*

In ***Leila Mringo's case*** (supra), the Court of Appeal held further that:-

> *"We also agree with Mr. Kamala that the words 'in addition to" used in section 40(2) of the ELRA did not mean to refer to awarding compensation in addition to reinstatement, rather, it meant to refer to other entitlements of the employee under different legislation or agreement; such as severance pay and payments agreed upon by the employer and employee. The subsection did not mean to include remedies already specifically provided for as alternatives in subsection (1)."*

The last quoted paragraph says all in relation to the application of section 40(2) of Cap. 366 R.E. (supra) that was relied upon by the arbitrator in erroneously awarding respondent TZS 336,865,580/= being 18 months salary remuneration from the date of termination to the date of the award. It is my view that, if arbitrator wanted respondent to be paid the said TZS 336,865,580/= being 18 months salary remuneration from the date of termination to the date of the award, then, he was supposed to order for reinstatement without loss of remuneration that would have given applicant two options, namely (i) to reinstate the respondent without loss of the said TZS 336,865,580/= which is salary for 18 months from the date of termination to the date of the award or (ii) not to reinstate the respondent and pay 12 months salaries plus the wages respondent was entitled from the date of termination to the date of final payment as per section 40(3) of Cap. 366 R.E. 2019(supra). I therefore hold that the award of TZS 336,865,580/= which is salary for 18 months from the date of termination to the date of the award was erroneously awarded to the respondent.

For the fore going, I hereby allow the application to the extent explained hereinabove, quash, and set aside the award of TZS

711,160,668/= and order applicant to pay respondent Three Hundred Seventy-Four Million Two Hundred Ninety-Five Thousand Eighty-Eight Tanzanian Shillings (TZS 374,295,088/=) only being 20 months salary compensation for unfair termination.

Dated at Dar es Salaam on this 11th August 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on 11th August 2023 in chambers in the presence of Hassan Mwemba, Advocate for the Applicant and Issa Mrindoko, Advocate, holding brief of Ms. Ernestilla John Bahati, Advocate for the Respondent.

B. E. K. Mganga
JUDGE