IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 858 OF 2019

STANBIC BANK(T) LTD .....APPLICANT
VERSUS
IDDI HALFANI.....RESPONDENT

JUDGMENT

Date of last Order: 18/11/2020
Date of Judgment: 14/12/2020
Z.G.Muruke, J.

The respondent was employed by the applicant on unspecified time on 18th April, 2017 as head of information Technology, under six months' probation period. Respondent being employed in the management cadre, his employment confirmation was subject to successful vetting by the regulator, Bank of Tanzania (BOT). Immediately after being employed respondent's personal particulars were sent by the applicant to the Bank of Tanzania (BOT) for vetting and approval. After vetting, (BOT) on 30th April, 2018, issued a letter of no objection to the appointment of the respondent as head of information technology.

Applicant having received positive response from the Bank of Tanzania after vetting, confirmed the respondent in his position as Head of Information and Technology on 18th May, 2018. Surprisingly on 12th November, 2018, just six month after regulator (BOT) positive vetting and no objection letter, the applicant received a letter from the same Bank of Tanzania to the effect that, BOT has come across negative information

against the respondent that renders him no longer fit and proper to continue holding a senior management position. The letter stated further that, the Bank of Tanzania has decided to reverse its earlier communicated vetting clearance, thus, further instructed the applicant to relieve the respondent from his duties with immediate effect. As a result of the letter, applicant terminated respondent employment on 19th November, 2018, although had no any issue with him.

Being dissatisfied by termination, filed labour dispute number CMA/DSM/ILA/162/18/370 in the Commission for Mediation and Arbitration at Dar es Salaam, claiming to be unfairly terminated. Upon hearing both parties, commission decided in favour of respondent, holding that respondent was unfairly terminated from employment by the applicant both substantively and procedural, thus ordering payment of 419,760,000 Tshs, being twenty four months salaries, as compensation.

The award dissatisfied applicant, thus filed present revision raising following grounds:

(i) That the arbitrator erred in law and in fact for failure to hold that the respondent failed to file the dispute against proper parties including the Bank of Tanzania as it became apparent that the respondent was informed at the very beginning including being availed with a copy of the letter from BOT that his employment was being terminated following orders from the Bank of Tanzania

(ii) That the arbitrator erred in law and fact by failing to exercise her powers under the law as she failed to order joining of the Bank of Tanzania as a respondent in the dispute as it became apparent in the respective opening

statements that the respondent was terminated following the order of the Bank of Tanzania whom the applicant is under statutory duty to obey.

(iii) That the arbitrator erred in law and in fact by holding that the respondent was unfairly terminated in terms of substance by the applicant while it became apparent before her that the respondent was terminated following order of the Bank of Tanzania who is the applicant regulator as well as the respondent as senior manager.

(iv) That the arbitrator erred in law and in fact for holding that lack of fair and valid reasons for termination lied upon the applicant while it was apparent before the arbitrator that an order to terminate the respondent emanated from the Bank of Tanzania hence if at all reasons for termination were required to be established it was none other than the Bank of Tanzania who was better placed to bear responsibility.

(v) That the arbitrator erred in law and in fact by holding that the respondent was unfairly terminated by the applicant while the arbitrator admitted that vetting process which resulted into the termination was not in the hands or control of the applicant.

(vi) That the arbitrator erred in law and in fact by holding that the applicant did not follow procedures in terminating the respondent while it was established that the respondent's termination was orchestrated by the Bank of Tanzania

(vii) The arbitrator erred in law and fact for granting the respondent twenty four months salaries against the applicant as it was excessively awarded against the applicant given the circumstances of the case.

From the grounds of revision, applicant raised following issues for determination.

(i) Whether the honourable arbitrator could have arbitrated the dispute successfully without ordering the respondent to join the Bank of Tanzania as a necessary party.

(ii) Whether the honourable arbitrator was legally correct for not invoking her powers under the law to order joining of the Bank of Tanzania as a necessary party in the dispute.

(iii) Whether the arbitrator was legally correct for holding that the respondent was unfairly terminated by the applicant in terms of substance while it because apparent that the respondent was terminated following orders of the Bank of Tanzania who is the applicant regulator as well as the respondent as senior manager.

(iv) Whether the Honourable arbitrator was legally correct for holding that the respondent was unfairly terminated in terms of procedure while it became apparent before the arbitrator that termination of the respondent was carried out following order from the Bank of Tanzania.

(v) Whether the relief of twenty four months (24) months compensation granted by commission to the respondent was legally justifiable in law.

On the hearing date applicant was represented by Sheppo Magirari, learned counsel and E. Bahati, learned advocate represented respondent. By consent hearing was ordered to be by way of written submission.

In support of the application it was submitted that, the applicant being a financial institution, he is absolutely under regulations, order and directives of the Bank of Tanzania (BoT) thus under obligation to comply with all orders from the regulator. Applicant received a letter from the Bank of Tanzania informing that the Bank of Tanzania has come across a negative information against the respondent which renders him to no longer fit and proper to continue holding a senior management position. The letter stated further that the Bank of Tanzania has decided to reverse its earlier on communicated vetting clearance, and further instructed the

applicant to relieve the respondent from his duties with immediately effect failure of which the applicant was to be subjected to sanctions. The letter was tendered at the CMA as Exhibit I – 4.Thus applicant was left with no option but to terminate the respondent's employment contract on 19th November, 2018, although the applicant had no any issue with the respondent.

Powers of the Bank of Tanzania to regulate banks and financial institutions are statutory and are provided for among others at section 4 of the **Banking and Financial Institutions Act Cap 342 of 2006**, and Further at Section 13(1) of **Banking and Financial Institution (Licensing) Regulations 2014.** There are sanction for failure to comply with the BOT directives, the same is provided for under Section 42(1) of the Act.

Applicant counsel further submitted that, basis of the award in favour of the respondent was that although the termination of the respondent was not occasioned at the instance of the applicant, the applicant ought to have literally refused the Bank of Tanzania's order and instead inquired its substantive validity. When the applicant received the letter from BoT to terminate the respondent, he immediately informed the respondent of the predicament and served him with a copy of the letter. It is undisputed therefore, the respondent was very much aware of the circumstance of his termination. He knew for sure that, the applicant has been ordered by BoT to terminate his service and he knew that the respondent has no issue with him.

Applicant counsel further submitted that, in the endeavor to defend during trial at the CMA, the applicant brought a witness DW2 one Sara Eliufoo Senior analyst from BoT to testify. At Page four of the award, she explained powers upon which BoT ordered the applicant to terminated the respondent and the sanction on the applicant in an event BOT order would not have obeyed. However, ironically, DW2 turned hostile and insisted that although BOT ordered termination of the respondent, the applicant ought to have followed legal procedures. One cannot follow procedure if does not have a reason to terminate. Procedure involves investigation, investigation report, drafting and communicate alleged issue in question, hearing rights and hearing itself. All this carry with them reasons to terminate.

It is clear that the arbitrator's order to pay 24 months salaries was unfair on the part of the applicant. Why would she issue such an order against the applicant then, why 24 month's salaries? The arbitrator ought to have taken a judicial notice that provided power of monitoring and assessment of the respondent and his termination was not in the hands of the applicants. She ought to have gone an extra mile in order to determine the dispute fairly, lamented applicant counsel Mr. Shapo Magirali who then prayed for an award to be quashed and set aside.

On the other hand respondent counsel submitted that applicant counsel has gone to great lengths to reproduce word to word, the provisions to the Banking and Financial Institutions (Licensing) Regulations 2014 as well as the Banking and Financial Institutions Act Cap 342 of 2006, in a frivolous attempt to demonstrate that the applicant had no other option other than to terminate the employment of the respondent

immediately and summarily, upon received the communication from the BOT that had come across information that rendered the respondent unfit to hold the aforementioned position with the applicant.

With all due respect to counsel for the applicant, Position started is irrelevant to the instant suit and the applicant has either completely misconceived the facts of the matter or it is deliberately attempting to mislead this honourable court away from the facts of the matter. It should be noted that by the applicants own admission, not only did the applicant's star witness from the BOT (DW2) acknowledge (under oath) that the BOT would not penalize the applicant for not immediately terminating the respondent. More so, DW2 further cemented and confirmed that the applicant was indeed obliged to adhere to statutory termination procedures. As such, the applicant cannot now endeavor to deploy tactics to allow itself to back peddle on its own failure to act accordingly in both its unfair and un procedural termination of the respondent and poor defense at the CMA.

Section 37(2) of the Employment and Labour Relations Act 2004 (hereinafter ELRA) and Rule 9(4) of the Employment and Labour Relations (Code of Good Practise Rules, 2007 provides that a termination of employment **shall be deemed to be unfair if the employer fails to prove:**

(a) ***That the reason*** for the termination is valid,

(b) That the reason is ***a fair reason*** related to (i) the employee's conduct, capacity and compatibility; or (ii) based on the operational requirements of the employer; and

(c) That **the employment was terminated in accordance with a fair procedure** (emphasis added)

The applicant states that "*the applicant had no option other than to comply with the order of the regulator.*" The said order referred here, is the letter dated 12th November, 2018. The said letter stated, that the BOT came across information that rendered the respondent unfit **to occupy a senior management position** in the employment of the applicant and instructed the applicant to ensure that the respondent is relieved of his duties immediately. Would being "relived of his duties" mean immediate termination without due process? It is inconceivable to argue that the BOT would have instructed the applicant to act in breach of the law, which was not the case at all.

That the duties that the respondent was to be relied of are those of as a senior management officer which as a banking institution is subject to BOT approval and not as an employee of Stanbic Bank (applicant). Upon receipt of this communication, the applicant failed to inquire from the BOT as to what that information rendered the respondent unfit, failed to initiate and/or undertake any consultation with the respondent to gauge he would be open to accepting a post that was non-senior managerial, or offer a position with the applicant in another jurisdiction as previously done by the applicant with other senior management officers with similar BOT vetting issues. Having acted in the manner that the applicant did, to date, the respondent is unaware of the reason for his termination, which contravenes the provisions of Section 37(2) of the ELRA (supra), that requires the reason for termination to be valid and fair.

Under the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007, Rule 22(1)(a), one of the types of incompatibility is **"unsuitability of the employee to his work due to his character or disposition."** Under Rule 22(2) of the same Regulations, incompatibility is treated in a similar way to incapacity for poor work performance and the procedure to be followed in terminating an employee for this reason is the same as that on incapacity. In particular, an employer shall.

(a) Record the incident of incompatibility that gave rise to concrete problems or disruption.

(b) The employee of unacceptable conduct and what remedial action is proposed.

Under the rule 22(4), before terminating employment on this ground, the employer is required to give an employee a fair opportunity to:

(a) Consider and reply to the allegation of incompatibility

(b) Remove the cause for disharmony, or

(c) Propose an alternative to termination

Applicants were obliged to comply to the requirements of the BoT letter, they were nevertheless equally obliged to comply with the requirements of the law regulating termination of employment contracts, in particular, Rule 24(3)(b) of the Labour Institutions (Mediation and Arbitration) GN 64. Even if the BoT letter constituted enough reasons to terminate the applicant's contract, they were still required to follow the law with regards to termination of an employment contract. This was the point of determination in the Tribunal which found that the applicants did not act

in accordance with the law. The applicants could not then hide under the BoT instructions as they cannot do so before this court.

Obligation on the part of the applicants to follow the prescribed legal process in terminating the respondent's contract of employment, was discussed in the case of ***Othman R. Ntarru Vs. Baraza Kuu la Waislam Tanzania***, Revision No. 323 of 2013 where Hon. Aboud, J stated that "*... the law puts the burden of proof on the employer to prove that he had sufficient reasons and followed the required procedure to terminate the employee*". In fact in this case, the applicant's own witnesses proved that did not follow the law but instead simply proceeded to terminate the respondents contract of employment. How then can they now come before this court and seek to join BoT or to seek to deny the respondent enjoyment of the award in remedy of the injury they have cause to the respondent. In complying with the BoT regulatory requirement, the applicant were not entitled to act in breach of the mandatory statutory procedure stipulated under Rule 24(3)(b) of the Labour Institutions (Mediation and Arbitration) GN 64.

According to **Section 40(1)(c) of the Employment and Labour Relations Act, 2004,** the commission is empowered to order compensation of not less than 12 months salaries in case of unfair termination. The provision accords the commission a discretion as regards the maximum compensation but not the minimum. As such, the award to the respondent by the CMA was well within the power of the CMA to grant. We further submit that the applicant's termination was unfair both substantively and procedurally. It is clear from the applicant's own

admissions in its written submissions hand also from the above submissions, that the applicants did not act in accordance with the statutory requirements in the termination of the respondent's contract of employment and as such it therefore renders the termination unfair both substantively and procedurally and this was confirmed by the Award in favour of the respondent.

In term of S.40(1) of the Act, read together with Rule 32(1) of the Labour Institutions (Mediation and Arbitration Guidelines) GN No. 67/2007 (hereinafter referred to as the Rules) the court or the arbitrator, in the event, the termination is found to be unfair may order the employer to: reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or to re-engage the employee on any terms that the arbitrator or the court may decide; or to pay compensation to the employee of not less than twelve months remuneration.

Further, **Rule 32(2)(b)&(c)** of the **Rules** stipulates that, the arbitrator shall not order reinstatement or re engagement where the employee does not with to be reinstated or re-engaged; circumstances surrounding the termination are such that a continued employemed relationship would be intolerable and that it is not reasonably practical for the employer to re-instate or re-engage the employee. Due to circumstances of this dispute as discussed above, the commission finds compensation to be the right remedy as claimed by the complainant.

In determining the amount of compensation Rule 32(5) of the Rules is guiding. According to the stated Rule the arbitrator may make an award of the appropriate compensation based on the circumstances of each case considering:- any prescribed minima or maxima compensation; the extent to which the termination was unfair; the consequences of the unfair termination for the parties, **including the extent to which the employee was able to secure alternative work or employment;** the amount of the employee's remuneration; the amount of compensation granted in previous similar cases; The parties conduct during the proceedings, and any relevant factors.

In CMA form number I, respondent prayed for forty eight month's salary as compensation for unfair termination. That is right in the circumstances of this case. In the case of **Branch Director CRDB Bank Vs. Titoh Kwareh,** Revision NO. 14/2011 at page 3 and 4 it was stated, I quote;

> "One thing I wish to put clear here is that the provision that compensation of not less than 12 months" is prescribed in minimum terms. It does not prohibit the arbitrator to award more considering the circumstances of each case. The respondent claimed compensation of 72 month's salary from the applicant and having considered the circumstances and the manner the termination was effected CMA was satisfied that the respondent is entitled to compensation of 60 month's salary instead of the amount claimed.
>
> It is my considered opinion, that the employer's action amount to unfair termination in terms of the law, therefore the CMA correctly ordered

the applicant/employer to pay compensation of 60 month's salary as per Section 40(3) of the Act to the respondent..."

The commission found compensation of **twenty four months' (24) remuneration** is appropriate and reasonable to the complainant, **and ordered the applicant to pay the respondent as per Section 40(1)(c) of the Act.** The reason for such compensation above the minimum required, the complainant been rendered unfit to remain as the Head of Information Technology with the respondent without the reasons for the same being disclosed, is jeorpadizing his future chances of employment as any future employers may be reluctant to employ him. Secondly, it was not the respondent who initiated the complainant's termination nor ill motive has been established on the part of the respondent.

Having heard both parties submission, this court wish to combine issue number one and two as both speak of failure by arbitrator to join BoT as necessary part to the proceedings at CMA. There is no dispute that BoT is a regulator of the applicant (the bank) in terms of Section 4 of the banking and Financial Institutions Act Cap 342 of 2006, and Section 13(1) of the Banking and Financial Institution (Licensing) regulation 2014.

BoT by being regulator of Stanbic Bank, does not make her, a party to the contract between Stanbic Bank and it's employee. Thus, any dispute between applicant and her employees in their day to day operations is related to employer and employee relationship. The letter written in the cause of supervisory role by BoT, does not automatically make BoT a party to the dispute. Assuming it was necessary then, it is applicant who was to

join BoT under the third party procedure. So, arbitrator cannot amend part to the CMA proceedings, unless moved by party whom he thinks, liability will be sholded by a third party. Thus, there is nothing wrong done by arbitrator worth of blaming, because parties are bound by their own pleadings. There is no evidence in the CMA proceedings that applicant applied to join BoT, that arbitrator failed to grant. The law affords parties the right to make application seeking for a person to be joined as a party to proceedings (Rule 24(3)(b) of the Labour Institutions (Mediation and Arbitration) GN 64). The applicant did not use the opportunity to do so at the CMA Level, and is therefore estopped from complaining.

In short, issue number one and two is answered in the affirmative that Arbitrator correctly proceeded without joining BoT in the dispute.

Issue number 3 and 4 they are also combined as they speak of arbitrator holding that, respondent was unfairly terminated. From the pleadings both at CMA and this court, there is no dispute that, there is any breach done by respondent against applicant whose defense is that the followed BoT letter (the regulator). It is this court conviction that in an employment contract, employer must prove that there is breach of terms by the employee. The standard of proof is therefore one of reasonable certainty. Breach of employment terms, absolute certainty is required. Difficult arises where the breach claimed is somewhat speculative. Mere possibility must be ignored. It is not issue of probability that employee may have breached the contract. It is not a matter of trial and error in ascertaining breach by the employee. **Employer should not gamble**

with One's right to work. To this court, "*A man's right to work is just as important to his life.*

The constitution of the United Republic of Tanzania guarantees One's right to work. Equally, when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned. Thus, *termination of employment must be first substantively fair with fair and valid reasons putting in regards that the concept of Right to work as a component of human rights, is so fundamental and therefore guaranteed by different international legal instruments.*

The ILO Convention on Termination of Employment, of C 158 – termination of employment convention 1982 (No. 158) provides that:-

> ***Article 4:....The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on operational requirements of the undertaking, establishment or service....***

The Universal Declaration of Human Rights 1948, also provide for on right to work that:-

> Article 23(1).... ***Everyone has the right to work to free choice of employment to just and favourable condition of work and to protection against unemployment.....***

The African Charter on Human and Peoples' Rights 981, also guarantees right to work that:-

> ***Article 15: .... Every individual shall have right to work under equitable and satisfactory condition and shall receive equal pay for equal work.....***

The Book titled African Bishops on Human Rights by Stanislaus Muyemba, A source Book, Paulines Publications Africa. it is proclaimed that:-

> ***"... the right to work includes the right to security and stability of employment. This implies the employee has a right not to lose one's job unfairly. Industrial courts should be instituted to provide legal protection against unfair dismissals and retrenchments. Such incidents are common within the context of privatization as carried out by the government. In case of unjustified and unlawful dismissals, the employee has the right to indemnity or to reinstatement on the job."***

In the case of **Augustine Masatu Vs. Mwanza Textile** Civil Case No. 3/1986 High Court Tanzania Mwanza (unreported). Hon. Justice Mwalusanya argued that:-

> **"... The right to work is the most important civil right in the labour law of socialist countries. Its ideological basis is the need and necessity of the survival of the working class. It aims at securing the possibility of continued employment. It is not an empty slogan but a survival for existence. For this right to exist in real sense, it is necessary that economic, political and legal order of the society assure everybody who is capable**

of working of the possibility of participating in building his society through work in accordance with his capacity and education and the right to earn an income proportional to the quantum of his work. And so job security is the hall mark of the whole system. And Tanzania aspires to build a socialist society on the principle of Ujamaa na Kujitegemea..."

In another case of Attorney General Vs. Ryan [1980] 2 WLR 143'

"it has long been settled that a decision affecting the individuals rights which is arrived at by a procedures which offended against principles of natural justice, is outside jurisdiction of decision making authority."

There must be substantive and procedural fairness of termination of employment as provided for in **Section 37(2) of the Employment and Labour Relations Act, No. 6 of 2004** which states that:-

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

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

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

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

(ii) based on the operational requirements of the employer, and

*(c) that the employment was **terminated in accordance with a fair procedure."***

Right to be heard has been insisted in various case decisions including the case of **Tanzania Revenue Authority V. Andrew Mapunda**, Labour Rev. No. 104 of 2014, where it was held that:-

> "(i) *It is the established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other words there must be substantive fairness and procedural fairness of termination of employment, Section 37(2) of the Act.*
>
> (ii) *I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."*

Also this court in case of **National Microfinance Bank V. Saphet Machumu**, Rev. No. 710/2018 (unreported) it was stated that:-

> *"Termination of employment must be first substantively fair with fair and **valid reasons** putting in regard that the concept of right to work as a component of human rights, is so fundamental...."*

In the court of Appeal of Tanzania, Civil Appeal No. 61 of 2016 between **David Nzaligo Versus National Microfinance Bank PLC** (unreported) held at page 23 of the judgment as follows; that

> *"The right to be heard in any proceedings is paramount and this cannot be overstated enough. The right of the party to be heard before adverse action or decision is taken against him/her has been stated and emphasized by the court in numerous decision"*

On the same issue of right to be heard Court of Appeal of Tanzania went on further in **Abbas Sherally Vs. Abdul Sultan Haji Mohamed Fazalboy** Civil application No. 133 of 2002 (unreported).

> *"That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard because the violation is considered to be a breach of the principles of natural justice."*

Right to be heard is fundamental rights that Court of Appeal insisted in recent decision in Civil Appeal number 343/2019,Severo **Mutegeki and Rehema Mwasandube Vs. Mamlaka ya Maji Safi na Usafi wa Mazingira Dodoma DUWASA**, where Mugasha, J held at page 21 that;

> In the case at hand, it cannot be safely vouched that the appellants were given opportunity to be fully heard before being condemned. The right to be heard before adverse action or decision is taken against a party is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had a party been heard. This is so because the violation is considered to be a breach of natural justice.

At page 22 it was further held that;

> "In view of what we have endeavored to discuss, we are satisfied that the termination of employment of the appellants was unfair as correctly found by the CMA on account of denial of the right to be heard on the part of the appellants."

Letter from the BOT did not direct applicant to terminate respondent at all. It directed to relieve respondent from his position of senior

management position, as correctly testified by applicant witness Eutropia Vegula (DW1) at CMA. Assuming, that there was negativity found by BoT, is respondent, not required to know, and answer to the same? Because the issue of negatively found are the cause of his termination. Applicant ought to have joined BoT for them to testify on negative information about respondent, whom they cleared positively few months before coming with different version.

Court of Appeal in the case of Severo Mutegeki and Rehema Mwasandile (Supra) on right to be heard on reason of termination held that:-

> "It is our considered view that, though the Internal Auditor's ultimate reporting responsibility lies to the Director General it is not in dispute that, those actually audited were the appellants and it is the audit report which triggered the charges against them. In that regard, the non-involvement of the appellants and subsequent conviction based on that report was irregular because they could not adequately prepare for the hearing before the disciplinary committee of the respondent. Instead, it is the respondent who being in possession of the report had all the ammunition to make a stronger case which was to the disadvantage of the appellants which renders what followed to be unprocedural."

Right to hear one before making decision that affect his wrights was also discussed. In case of **SIMEON MANYAKI VS. THE INSITUTE OF FINANCE MANAGEMENT** [1984] TLR 304 among other things, that:

(i) An administrative body exercising functions that impinge directly on legally recognized interests has a

duty to act judicially in accordance with the rules of natural justice,

(ii) *The applicant whose rights and legitimate expectations stood to be so adversely affected by the inquiry had the right:*

a. *of being sufficiently appraised of the particulars of the prejudicial allegations that were to be made or had been made against him, so that he could effectively prepare his answer and collect evidence necessary to rebut the case against him;*
b. *subject to the need for withholding details in order to protect other overriding interest, of being accorded sufficient opportunity of controverting or commenting on the materials that had been tendered or were to be tendered against him;*
c. *of presenting his own case;*
d. *of being given a reasonable and fair deal..."*

From the records, specifically letter from the BOT, did not give applicant directive to terminate respondent. Assuming it gave directives which is not the case, yet respondent was to be given right of audience which applicant admitted not to comply as he had no any issue with him. Throughout her entire testimony at the trial hearing by the commission, the applicant's witness, one Eutropia Vegula readily admitted that upon receipt of the letter from the BoT, the applicant did not follow any procedures for terminating the applicant's employment but instead telephoned the applicant, requested that he returns to Tanzania, and upon his arrival, **met with him at Alcove Bar, at the Sea Cliff Hotel and**

simply handed him his termination Notice and a copy of the letter from the BoT. It should be reiterated that this does **not in any way comply with the procedures for fair termination no any employment contract which the same was again testified to by the applicant's own witness. The applicants confirmed without any reasonable doubt through their own evidence that they acted in breach of the law.**

Looking at CMA proceedings from mediation to arbitration, the issue of unfairly terminating respondent was so glaring. Equally, before this court, applicant admitted to have been terminated respondent following BoT letter which did not direct to terminate respondent. With due respect to the applicant counsel, the manner in which they continued with dispute, leaves a lot to be desired. It was a case for settlement as they had no any issue with the respondent rather than prolonging the dispute from December, 2018 to December, 2020.

It should be born in mind that one of the purposes of labour law is to regulate and guide relations in the employment and labour industry. It does so by providing remedies and facilitating access to tribunals and courts for settlement of labour disputes in most cases without costs. According to Section 50(6) of the Labour Institutions Act No. 7 of 2004 as amended by Section 19(b) of the written laws (Miscellaneous Amendment) Act No. 3 of 2010 and Rule 51 of the GN No. 106 of 2007 and Section 88(9) of the Employment and Labour Relations Act No. 6 of 2004 and Rule 34 of the GN No. 64 of 2007, Labour disputes are free of costs, interests and fees, however, costs are only allowed where there is the proof of

frivolous and/or vexatious proceedings. Issue of costs in labour cases was also discussed in the case of Tanzania Breweries Limited Vs. Nancy Maronie, Labour Dispute no. 182 of 2015 (unreported) where it was held that;

> ***Whether the dispute or application is before the Commission for Mediation and Arbitration or in the High Court of Tanzania, cost is awarded only where there is an existence of frivolous and/or vexatious proceedings.***

Honourable Vallensi Wambali, Acting Director Arbitration Department in the Commission for Mediation and Arbitration (CMA) in his recent paper titled IS COST FREE THE SOURCE OF DELAY IN HANDLING LABOUR DISPUTE: LAW AND PRACTICE IN TANZANIA, at page 3 paragraph 2 he said. ***The law is designed to make sure that in making decisions on costs orders the CMA and LC seek to strike a balance between on one hand, not unduly discouraging employees, employers, unions and employers association from approaching the Commission for Mediation and Arbitration(CMA) and Labour Court (LC) to have their disputes dealt with and on the other hand not allowing those parties to being frivolous and vexatious case.***

Court of Appeal granted costs upon withdraw of the notice of appeal in a matter originated from labour dispute in **Civil Application No. 600/08 of 2017 Stanbic Bank Tanzania Limited Vs. Bryson Mushi,** for clarity order is reflected below.

> *Upon the applicant lodging in Court a notice of withdrawal of the application on 22/05/2020 and non –appearance while duly notified to appear, Mr. Steven Emanuel Makwega, Learned Advocate, who*

appeared for the respondent, had no objection to the prayer to withdraw the application but he pressed for costs.

We indeed, agree with Mr. Makwega that the applicant lodged the aforesaid notice for withdrawal of the application in terms of Rule 58(1) and (2) of the Tanzania Court of Appeal Rules, 2019 (the rules). We accordingly grant the applicant's prayer we mark the application withdrawn under Rule 58(3) of the Rules. The respondent to have costs of the case.

The above Court of Appeal decision is based on withdraw of notice, only, but costs was granted. The case at hand respondent has been in machinery of justice for three years cause being applicant. It is worth insisting that the law is designed to make sure that in making decision on costs the Commission for Mediation and Arbitration (CMA) and Labour Court, seek to strike a balance between on one hand, not **unduly discouraging** employees, employers, unions and employers association from approaching the CMA and Labour Court to have their disputes dealt with and on the other hand not **allowing those parties to bring frivolous and vexatious case.**

According to Vallenci Wambali (supra) cost-free labour litigation as contemplated by the International Instrument had good motive specifically in assisting the **weaker** party who have **genuine claims** to easily access the court and Tribunal with aim of resolving the dispute **fairly** and **quickly** with the spirit of repairing the relationship between capital and labour. At the same time looking the way forward on how to increase efficiency through productivity at work and when doing so, social justice is upheld.

The aim of cost –free was not to delay or deny or burry justice rather was to make sure justice is costless and time met.

It should be understood that, cost-free in labour matters is not a leeway or loophole to the parties to waste time and other resource, either in the Commission or in Courts and once this is not observed the court or the Commission will regulate the situation by awarding costs where frivolous and vexation acts have been proved.

From the records applicant did not act prudently as employer on the following reasons;

(1) Applicant after receiving the letter from BoT, ought to have discussed with respondent way forward, because the letter did not say terminate respondent.

(2) Applicant ought to have inquired more on negative issues BoT found and address the same while discussing with respondent for him to know his problem.

(3) After institution of dispute at CMA, applicant ought to have settled the case and allowing respondent to resign if he needed as one of the options, or any other options.

(4) Applicant present revision, although is her right to be heard, but, ought to have considered that, she breached fundamental right of not hearing respondent.

(5) Applicant knowing and admitting that he did not hear the respondent, yet filed present revision on basis of letter from BoT, which letter did not direct termination of respondent, therefore it is an abuse of court process and more so, revision application is vexatious.

In the upshort application for revision before this court is dismissed with the costs.

Z.G.Muruke

JUDGE

14/12/2020

Judgment delivered in the presence of Doreen Athanas, Advocate for respondent and in the absence of applicant.

Z.G.Muruke

JUDGE

14/12/2020