IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 28332 OF 2023

(Arising from an Award issued on 21/11/2023 by Hon. Mbeyale, R, Arbitrator, in Labour dispute No. CMA/DSM/KIN/21/2023/25/2023 at Kinondoni)

GODFREY NDALAHWA..... APPLICANT

VERSUS

DCB COMMERCIAL BANK PLC..... RESPONDENT

JUDGMENT

Date of last Order: 28/2/2024
Date of Judgment: 15/3/2024

B. E. K. Mganga, J.

Brief facts of this application are that, on 11th August 2017, applicant signed three years fixed term contract of employment with the respondent at monthly salary of TZS 22,000,000/=. In the said three years fixed term contract, applicant was appointed as the Managing Director of the respondent and that the contract was renewable. The parties agreed also in the said fixed term contract that, taking over by the applicant as Managing Director commenced on 15th October 2017 and that appointment as Managing Director was effective from 2nd January 2018. It is undisputed by the parties that, all persons working in top management of Financial Institutions, must first get approval from the Central Bank of Tanzania(BOT). It is also undisputed by the parties

that, on 15th September 2017, BOT approved applicant to work with the respondent as the Managing Director. It is further undisputed by the parties that, the said three years fixed term contract expired on 31st December 2020. After expiry of the said three years fixed term contract, the parties signed employment contract renewal whereby the tenure of the applicant as Managing Director was extended to four years with effect from 1st January 2021 to 31st December 2024 at monthly salary of TZS 26,818,000/=. After one year, ten months and sixteen days of operation of the said four years renewed fixed term contract, on 16th November 2022, the parties signed Mutual Agreement Regarding Termination of Employment. In the said Mutual Agreement Regarding Termination of Employment, the parties stated *inter-alia* that, 30th June 2023 is the effective date of the agreement and that, the amount payable to the applicant is TZS 430,000,000/=.

On 1st December 2022, the Central Bank of Tanzania (BOT) revoked approval that it issued on 15th September 2017 to the applicant. On 5th December 2022, respondent served the applicant a letter notifying him revocation of his vetting by BOT and further directing him to handover the office to Mr. Isidori Msaki who was appointed by the respondent as the Acting Managing Director. Further to that, respondent directed the applicant not to attend at work on that week. On 14th

December 2022, respondent wrote a notice requesting the applicant to attend a Board of Directors meeting to be held on 16th December 2022 to discuss the way forward following revocation of the applicant's vetting by BOT. On 15th December 2022, respondent issued a public notice in the Citizen Newspaper that, on 6th December 2022 Mr. Isidori Msaki was appointed as the Acting Managing Director following departure of the applicant who, worked dedicatedly and successfully with the respondent for five years.

On 19th December 2022, respondent served applicant with a letter notifying him that his employment contract was terminated with effective from 16th December 2022 following revocation of his vetting by BOT and that, upon receipt of the said letter, but not later than close of business on 20th December 2022, to fully handover his duties to Mr. Isidori Msaki.

Applicant was aggrieved with what happened, as a result, on 13th January 2023, he filed Labour dispute No. CMA/DSM/KIN/21/2023/25/2023 before the Commission for Mediation and Arbitration(CMA) at Kinondoni complaining that respondent breached the contract of employment. In the Referral Form(CMA F1) applicant indicated that he was claiming (i) to be paid TZS

430,000,000/= as compensation, (ii) to be paid unpaid allowances, (ii) general damages and (iv) be issued with a certificate of service.

On 21st November 2023, Hon. Mbeyale R, Arbitrator, who heard evidence of the parties issued an Award dismissing the claims of the applicant holding that respondent had a valid reason to terminate employment contract of the applicant since it was frustrated after revocation of applicant's vetting by BOT. The arbitrator also found that, the public notice in the Citizen Newspaper did not ruin or injure applicant's reputation or career and that, all claims by the applicant are baseless save for Certificate of Service which applicant was entitled to be issued.

Applicant was aggrieved with the said decision, as a result, he file this application for revision. In his affidavit in support of the application, he raised a total of Seven (7) grounds namely:-

1. *That, the Honourable Arbitrator erred in law and facts in holding that BOT letter admitted as exhibit D2 at CMA amounted into a frustration of the contract of employment.*
2. *That, the Honourable Arbitrator erred in law and facts by bringing issues of unfair termination while the dispute was about breach of the Mutual Separation agreement executed by the parties.*
3. *That, the Honourable Arbitrator erred in law and facts by bringing the doctrine of frustration of a contract which had already been mutually terminated by the parties.*

4. *The Arbitrator failed to appreciate the ratio decidendi of the case of Stanbic Bank (T) Limited v. Iddi Halfani, Civil Appeal No. 139 of 2021 CAT at Dar es Salaam[unreported] in relation to the case at hand by claiming that the contract of employment was frustrated.*
5. *The arbitrator erred in law and facts in holding that the respondent had valid cause to terminate the contract and failed to ascertain the mandatory procedural aspect of termination of the contract of employment.*
6. *The arbitrator failed to evaluate evidence on record and came up with wrong and un-authoritative conclusion that the contract was frustrated while the BOT never terminated the Applicant's employment.*
7. *That whether the arbitrator rightly determined the reliefs entitled to the Applicant based on the Mutual Agreement Regarding Termination of Employment(Exhibit- P3).*

When the application was called on for hearing, Mr. Roman Masumbuko, advocate, appeared for and on behalf of the applicant while Ms. Oliver Mkanzabi and Mr. Geofrey Geay, advocates appeared for and on behalf of the respondent.

Before kicking off hearing of the application, Mr. Masumbuko learned counsel for the applicant prayed to add the 8th ground namely, that, proceedings at the CMA were a nullity due to the fact that they were conducted by an advocate of the respondent who had a conflict of interest. Learned counsel for the respondent had no objection hence total grounds advanced by the applicant in this application are 8.

In arguing this application for revision, learned counsel for the applicant started with the 8th ground submitting that, the Mutual

Agreement Regarding Termination of Employment (exhibit P3) between the parties, which was the centre of the dispute at CMA, was drafted by Alex Mgongolwa with his firm called Excellent Attorneys(Advocates). He further submitted that, the said exhibit P3 was signed by the applicant and respondent and that, at the end, it was initialed by Excellent Attorneys. He added that, the said agreement was witnessed by Lujaina Salum Mohamed from Excellent Attorneys. Masumbuko submitted further that, clause 7 of exhibit P3 related to confidentiality and disclosure which binds the parties and naturally, the parties who were involved in negotiation or drafting of the said agreement. He added that, clause 7.1.3 of exhibit P3 on confidential information, bind even professional advisors. He went on that, Excellent Attorneys were part to exhibit P3 and were bound by confidentiality hence, they were supposed to be witnesses of the parties, but they breached confidentiality and turned to be advocates of the respondent at CMA. Learned counsel for the applicant submitted further that, Regulation 45 of the Advocates (Professional conduct and etiquettes) Regulations, GN. No. 118 of 2018 prohibits an advocate with a conflict of interest to participate in the matter and that, conflict of interest is extended to include other clients. To cement on that counsel who represented respondent at CMA had a conflict of interest, Mr. Masumbuko cited the case of ***UAP Insurance***

Tanzania Limited v. Akiba Commercial Bank PLC, Civil Appeal No. 135 of 2022, CAT (Unreported). He submitted further that, in ***UAP's case***(supra), the Court of Appeal found that the advocate had a conflict of interest and that, due to conflict of interest, it was held that proceeding violated fair trial principles. He added that, based on those findings, proceedings were nullified and ordered *trial de novo* before another judge. He concluded that, Excellent Attorneys had a duty of confidentiality to the parties and prayed the court to nullify CMA proceedings, quash and set aside the award and order trial *de novo* before different arbitrator.

Arguing the 1st, 2nd, and 3rd grounds, learned counsel for the applicant submitted that, the arbitrator erred in holding that a letter from the Bank of Tanzania (BOT) revoking vetting of the applicant (exhibit D2) amounted to frustration of the contract of employment. Mr. Masumbuko submitted further that, initially applicant had a three-year contract (exhibit P1) that expired on 4th January 2021. He submitted that, in exhibit P1, vetting was done and issued by BOT. He submitted further that, on 4th January 2021, applicant was granted extension of employment for 4 years as per exhibit P2 but there was no requirement of vetting. Learned counsel for the applicant submitted further that, more than one year after the parties had signed extension of the

contract of employment for four years, on 16th November 2022, the parties signed Mutual agreement regarding termination of employment (exhibit P3). He added that, exhibit P3 was signed after applicant has worked for one (1) year and Eleven (11) months on the extended four years contract of employment.

Learned counsel for the applicant submitted that, on 1st December 2022, BOT issued revocation of vetting (exhibit D3) while the parties had already signed Mutual Agreement Regarding Termination of Employment(exhibit P3). He submitted further that, exhibit D2 did not frustrate employment contract of the parties because, the parties had already agreed to terminate the contract. He added that, exhibit D2 refers to the contract that was already expired and not the contract that the parties agreed to terminate mutually. He went on that, Clause 4.1.14 of exhibit P3 provides that, the agreement was a final settlement of all claims including fairness of termination and operation of the law. Learned counsel concluded that, the arbitrator was wrong to infer the principles of frustration.

Learned counsel for the applicant submitted further that, from 16th November 2022, the date the parties signed exhibit P3, applicant was serving the respondent in a transition phase that was supposed to end on 30th June 2023. He argued that, at the time of issuance of

exhibit D2, applicant was not in his normal employment duties. Learned counsel for the applicant strongly submitted that, applicant's employment was terminated on 16th December 2022 and that, at that time, there was no frustration at all because, the parties had already agreed to terminate the contract as per exhibit P3 that was signed on 16th November 2022. To support his submissions that there was no frustration, learned counsel for the applicant relied on clause 13 of exhibit P3 arguing that the said clause provides that exhibit P3 replaced previous contracts of employment between the parties. Mr. Masumbuko argued that, the contract of four(4) years (exhibit P2) was not frustrated as it was already replaced by exhibit P3. To support his submissions, leaned counsel for the applicant referred the court to the case of ***Leah D. Kaimne v. The Registered Trustees of Bugando Medical Centre***, Civil Appeal No. 327 of 2021, CAT(unreported). Counsel for the applicant further submitted that, parties are bound by their contract namely, exhibit P3. To cement on his submissions, counsel for the applicant referred the court to the case of ***Robert Schelten v. Sudesh Kumar varma and Another***, Civil Appeal No. 203 of 2019, CAT(unreported) on the position that, sanctity of contracts must be protected, otherwise, contracts will have no legal effect. He further submitted that, the arbitrator and the parties were bound by exhibit P3

because, the contract that has been terminated(exhibit P2) cannot be frustrated. He concluded that there was no frustration of contract of employment and referred the court to the case of ***China-Tanzania joint Shipping Line (Sinotashipp) v Karaka Enterprises***, Commercial case No. 140 of 2019, HC(comm) (unreported) on frustration of contracts and grounds for frustration.

Arguing the 4th, 5th, and 6 grounds, learned counsel for the applicant submitted that, the arbitrator relied on the decision of the Court of appeal in the case of ***Stanbic Bank(T) Limited) v. Iddi Khalfani***, Civil Appeal No. 139 of 2021, CAT(unreported) and quoted just few areas and left those which were in support of the applicant's case. Counsel for the applicant submitted that, in ***Stanbic's case*** (supra), the court of Appeal did not hold that whenever BOT issues a letter, then, employment contract becomes frustrated. He submitted further that, in ***Stanbic's case*** (supra), the Court of Appeal made it clear that, contracts of employment are special contracts with specific procedure of termination unlike other contracts. Learned counsel for the applicant submitted that, the right to terminate the contract was not of the BOT but, of the parties who were supposed either, to agree or to follow procedures of termination. He concluded that, in the application at hand, parties had already agreed to terminate the contract as per

exhibit P3 hence, BOT was not the cause of termination of applicant's contract of employment.

Arguing the 7th ground, learned counsel for the applicant submitted that, the arbitrator erred to deny all reliefs agreed in Mutual Agreement Regarding Termination of Employment(exhibit P3). Mr. Masumbuko submitted that, at CMA, there was no discussion of fairness of reason or procedure of termination, but applicant was only praying reliefs exhibit P3. With those submissions, counsel for the applicant prayed that the application be allowed.

Resisting the application, Mr. Geay, learned counsel for the respondent, arguing against the 8th ground, submitted that, Mutual Agreement Regarding Termination of Employment(exhibit P3)was drawn by Alex Mgongolwa, advocate. He added that, Alex Mgongolwa was mere drafter of exhibit P3 and that, he never attested it hence he was not conflicted. He also submitted that, at CMA, respondent was represented by Rashid Kalage, Advocate, from Excellent Attorney in which Alex Mgongolwa is one of the founding members. Mr. Geay submitted further that, duty of confidentiality covered only Alex Mgongolwa and not any other attorney from his office. He added that, Mgongolwa and or any other Advocate from Excellent Attorneys (Advocates) were not conflicted. Counsel submitted further that, the

UAP's case (supra) is distinguishable hence inapplicable in the circumstances of this application because in exhibit P3, Mgongolwa had no self-interest. He argued that, in ***UAP's case(***supra), the advocates were implicated hence they were direct beneficially unlike to the application at hand.

Mr. Geay submitted further that, in impartiality, the court should only look or consider direct benefits and not, indirect benefits. Counsel also submitted that, there is no proof that Lujaina Salum, advocate, who attested exhibit P3 works with Excellent Attorneys. Learned counsel for the respondent maintained that, there was no conflict of interest and that this ground should be dismissed.

Ms. Mkanzabi, advocate for the respondent, in supporting submissions by Mr. Geay, that there was no conflict of interest, submitted that, Regulation 45(1)of GN. No. 118 of 2018(supra) provides clearly that, conflict of interest should be the one likely to affect the judgment of the advocate or the client. She was quick to add that, it is not known, at the time of drafting exhibit P3, who was client of Mgongolwa, advocate between the parties in this application because evidence is wanting. Ms. Mkanzabi advocate in somehow self-defeating her earlier submissions, submitted that, the respondent was client of Mgongolwa from the beginning hence there was no conflict of interest.

Ms. Mkanzabi went on that, the fact that Kalage from Excellent represented the respondent, that alone did not lead to conflict of interest. She added that, in ***UAP's case***(supra), all attorneys participated in taking loan unlike to the application at hand where only Mgongolwa drafted exhibit P3.

Responding to submissions made on the 1st, 2nd and 3rd grounds, Mr. Geay submitted that, the arbitrator was justified to bring up the issue of frustration of contract because the same came up in evidence of the parties and that, parties made submissions thereof. Learned counsel for the respondent submitted that, clause 22 of exhibit P1 provides that it was subject to clearance with the Bank of Tanzania. He argued that, exhibit P2 at clause 4 provides that exhibit P2 was subject to the original contract namely exhibit P1 that expired. He added that, applicant's performance of the renewed contract(exhibit P2) was also subject to vetting.

Counsel for the respondent submitted further that, though exhibit P3 has no specific clause relating to vetting, vetting was an implied condition because, applicant was supposed to continue to work with the respondent in the transitional period of 6 months. He argued further that, Regulation 19(1) of the Banking and Financial Institutions Regulations, GN. No. 297 of 2014 provides that, for a person to be

appointed on a senior position, is subject to BOT Vetting. He further argued that, exhibit P3 cannot override the requirement of the said GN. No. 297 of 2014. Learned counsel for the respondent submitted that, revocation of vetting by BOT(exhibit D2)was with immediate effect.

On sanctity of contract, learned counsel for the respondent submitted that, section 37(1) of the Law of Contract [Cap. 345 R.E. 2029] provides sanctity of contracts but a contract cannot be enforced if it is affected by any other law. He went on that, applicant was excused to perform duties of the respondent by exhibit D2. He added that, exhibit P3 provides that applicant was supposed to be paid terminal benefit after expiry of transition period on 30th June 2023 but after almost 15 days of signing of the said exhibit P3, BOT through exhibit D2, revoked vetting of the applicant. He submitted further that, there was frustration of contract hence respondent is not entitled to be paid amount that was agreed in exhibit P3. Learned counsel for the respondent submitted further that, Section 33(1) of the Banking and Financial Institutions Act, No. 5 of 2006 provides mandatory obligations to the bank or the Board of Directors to comply with directives issued by BOT. He added that, after being served with exhibit D2, respondent had no choice other than to implement what she was ordered by BOT. He argued that, even if exhibit D2 did not refer to the renewed agreement

of employment, by implication, it was supposed to apply because, the position of the applicant required vetting. When probed by the court as when frustration was raised, Mr. Geay replied that it was in respondent's final submissions as it was not one of the issues drafted and agreed upon by the parties.

Regarding the 4th, 5th and 6th grounds, Mr. Geay submitted that, ***Iddi Khalfani's case*** (supra), is distinguishable because, in the said case, the issue was unfair termination while in the application at hand it is breach of contract. He added that, the said case is distinguishable because there was no mutual separation agreement. Learned counsel submitted further that, the issue of procedure of termination cannot apply in this case because it was not pleaded in CMA F1 and that, parties are bound by their pleadings. To support his submissions that parties are bound by their pleadings, he referred the court to the case of ***Impala Warehouse & Logistics (T) Ltd v. Samuel Kayombo and 3 others,*** Revision No. 926 of 2018, HC(unreported).

Regarding the 7th ground, Mr. Geay submitted that, compensation of TZS 430,000,0000/= and all other remedies claimed by the applicant were considered by the arbitrator and found that applicant was not entitled.

Submitting in addition to what was submitted by Mr. Geay on behalf of the respondent, Ms. Mkanzabi, learned advocate, submitted that, the arbitrator stated that there was frustration of mutual separation agreement and not the renewed contract of employment. She further submitted that, argument by counsel for the applicant that there was no contract of employment, implies that, applicant was not supposed to file the dispute at CMA. Ms. Mkanzabi also submitted that, both exhibit P3 and renewed contract(exhibit P2) required vetting and that, exhibit P3 did not unclothe the title of the applicant. She concluded her submissions that, there was no breach of contract, rather, the contract was frustrated and prayed this application be dismissed for want of merit.

In rejoinder, Mr. Masumbuko reiterated that, exhibit P3 was drafted by Alex Mgongolwa as an advocate in the umbrella of Excellence Attorneys firm. He added that, exhibit P3 was not drafted in personal capacity of Mr. Mgongolwa because there is no Chinese wall in law firms meaning that, in law firm, it is collective responsibility. He went on that, the acts of Mgongolwa cannot be separated from those of Excellent Attorneys (advocates). He argued that, submissions that Mgongolwa advocate was not paid is assumption and submissions from the bar. He argued further that, had Mgongolwa, advocate drafted exhibit P3 pro

bono, then, Mgongolwa could have so indicated in exhibit P3. Countering submissions by Ms. Mkanzabi that, in drafting exhibit P3 Mgongolwa, advocate acted on behalf of the respondent only, Mr. Masumbuko submitted that, Mgongolwa advocate acted for both the applicant and the respondent because, exhibit P3 does not show that he acted only for the respondent.

On frustration of contract, learned counsel for the applicant rejoined that, that was not among the issues that were drafted by the parties but was only raised in submissions by the respondent. He submitted further that, since it was raised by the respondent in her final submissions, applicant had no opportunity to respond on that aspect because, final submissions were filed on the same date. He added that, the arbitrator was supposed to resummon the parties, afford them right to be heard by asking them to address the issue of frustration and thereafter, include it in the award and not to do as she did because applicant was denied right to be heard.

Learned counsel for the applicant rejoined further that, there cannot be two contracts of employment namely exhibit P1 and P2 co-existing. He submitted further that, it is correct that parties are bound by their own pleadings as held in ***Impala's case*** (supra). He was quick to submit that, in the application at hand, the arbitrator departed from

pleadings of the parties and dealt with frustration of contract. Learned counsel for the applicant submitted further that, the contract was terminated while transition period had commenced hence it was wrong for the arbitrator to consider the contract that was already terminated by mutual agreement.

I have read evidence of the parties in the CMA record and considered rival submissions made by learned counsel on behalf of the parties. I would like from the start, thank them for their loaded submissions.

In disposing this application, I will start with the 8th ground raised by the applicant that CMA proceedings are a nullity because they were conducted by counsel for the respondent who had a conflict of interest. This issue has exercised my mind a little bit. Both parties have advanced interesting arguments as to whether there is or there is no conflict of interest in the application at hand. Applicant has relied on the decision of the Court of Appeal in the case of ***UAP Insurance Tanzania Limited vs AKIBA Commercial Bank PLC*** (Civil Appeal No. 135 of 2022) [2023] TZCA 17784 (31 October 2023) but counsel for the respondent are of the view that the said case is distinguishable on ground *inter-alia* that, it was not proved that Mr. Mgonglowa, advocate from Excellent Attorneys(advocates) who drew exhibit P3 was paid. With

due respect to counsel for the respondent, argument relating to whether Mgongolwa was paid or not, in my view, cannot distinguish the ***UAP's case*** (supra).

I have carefully read the CMA record and the ***UAP's case*** (supra) and find that, in the application at hand, the issue that advocate for the respondent was conflicted was not raised at CMA, as such, it is a new issue that was raised by the applicant at this revision stage. On the other hand, it is clear that, in ***UAP's case***(supra), the issue of conflict of interest by the law firm representing one of the parties was raised before this court but it was dismissed as it was clearly pointed out at page 2 of the Court of Appeal's judgment. In my view, that is the distinction.

It is my view that, applicant was supposed first to raise at CMA that counsel for the respondent had a conflict of interest for the arbitrator to make a decision thereof and upon dismissing that ground, then, raising it in this application could have been proper. Raising that issue at this stage, mean that, counsel for the applicant is inviting the court to determine the issue that was not determined wrongly or rightly by the arbitrator. It is my view that, that issue being not relating to jurisdiction cannot be raised at this revision stage. Normally, issues not raised at trial stage or before the lower court, cannot be entertained at

the appellate or revision stage. That position has been stated in a litany of case laws. See for example the case of ***Godfrey Wilson vs Republic*** (Criminal Appeal 168 of 2018) [2019] TZCA 109 (6 May 2019), ***Jasson Samson Rweikiza vs Novatus Rwechungura Nkwama*** (Civil Appeal 305 of 2020) [2021] TZCA 699 (29 November 2021), ***Richard Majenga vs Specioza Sylivester*** (Civil Appeal 208 of 2018) [2020] TZCA 227 (14 May 2020), ***Remigious Muganga vs Barrick Bulyanhulu Gold Mine*** (Civil Appeal 47 of 2017) [2018] TZCA 219 (10 October 2018) and ***Erastus Vicent Mtui vs COCA COLA Kwanza Limited*** (Consolidated Civil Appeal No. 619 of 2022 & 13 of 2023) [2024] TZCA 122 (23 February 2024) to mention but a few.

As pointed out hereinabove, at CMA, applicant did not state that counsel for the respondent has interest in the matter and that he should not defend the respondent. In my view, applicant has raised this issue at revision stage as an afterthought after losing at CMA and as a way to regroup ready for retrial at CMA. That cannot be allowed. In my view, had applicant been serious with the issue of conflict of interest of the learned counsel who conducted trial on behalf of the respondent at CMA, he would have raised that issue at CMA. Failure to raise that issue at CMA, by all necessary implications, applicant was of less concern with conflict of interest. Since the issue of conflict of interest was not raised

at CMA and since the same is not issue of jurisdiction that can be raised at any stage including revision or appeal stage, I find that the 8th ground is devoid of merit and dismiss it.

It was submitted by counsel for the applicant that arbitrator erred to apply the doctrine of frustration in this application in holding that after revocation of vetting of the applicant by BOT, the contract of employment was frustrated. It was submitted by both parties that, frustration was not amongst the issues that were drafted and agreed by the parties at CMA. It was submitted by counsel for the respondent that, the issue of frustration of contract came up in evidence of the parties and that, the parties made submissions thereof.

I have carefully examined the CMA record and find that, on 24th April 2023 only two issues were drafted and agreed by the parties namely, (i) whether there was breach of the complainant's contract, and (ii) to what relief(s) are the parties entitled to. Hence frustration was not among the issues that the parties were supposed to prove or disprove. I have also found that, during hearing at CMA, applicant (PW1) adduced evidence with a view of proving the afore drafted and agreed two issues only. The CMA record shows that applicant(PW1) was the first and the only witness to testify and thereafter followed by Msingo Mkanzabi(DW1), the Chief Human Resources Manager, the only witness

for the respondent. That was in compliance of Rule 24(3) of the Labour Institutions(Mediation and Arbitration Guideline) Rules, GN. No. 67 of 2007.

In his evidence, applicant (PW1) stated that, in 2017 respondent employed him as Managing Director for a fixed term contract of three years (exhibit P1) with monthly salary of TZS 22,000,000/= and that, the said contract expired on 31st December 2020. PW1 testified that, the position of Managing Director required approval from the Bank of Tanzania(BOT) and that, clearance was issued. PW1 testified further that, after expiry of the said contract(exhibit P1), due to his outstanding performance, he entered four years fixed term contract(exhibit P2) with the respondent and that, his monthly salary was increases from TZS 22,000,000/= to 26,818,000/=. In addition to that, PW1 testified that, he was entitled to a company house rented at USD 3500. PW1 testified further that, performed well as a result, assets of the respondent grew from TZS 130 billion to TZS 200 billion. PW1 also testified that, due to outstanding performance, respondent was voted as a preferred local bank.

In his evidence, PW1 also testified that, in August 2022 the Board Chairperson retired and that, in October 2022, Zawadia Nanyaro, the Acting Board Chairperson and David Shabue, member of the Board,

asked him to discuss whether he can agree to terminate the four years fixed term contract(exhibit P2). PW1 testified further that, a Board meeting was held and that, parties agreed that the negotiation team be formed. That, based on that meeting, on 16th November 2022, the parties signed Mutual Agreement Regarding Termination of Employment(exhibit P3) and that 30th June 2023 was the effective termination. In his evidence, PW1 stated that, parties agreed that he(PW1) will be paid termination package of TZS 430,000,000/=, unstated bonus and be issued with a certificate of service. It was evidence of PW1 that, exhibit P3 replaced the four years fixed term contract(exhibit P2) and that, in terms of exhibit P3, there was no need of vetting. PW1 testified further that, on 6th December 2022, he was notified that BOT has revoked his vetting(exhibit P4) and on 16th December 2022, respondent terminated his employment. PW1 testified that, he worked with the respondent under exhibit P3 from 16th November 2022 to 16th December 2022. PW1 also testified that he received termination letter on 19th December 2022 (exhibit P7) and that the contract that was valid at the time of termination was exhibit P3. It was evidence of PW1 that after termination, he was paid one month salary, housing accommodation and leave pay and that he was claiming to be paid a total of TZS 984,277,071.

While under cross examination, PW1 testified that, the four years fixed term contract (exhibit P2) commenced on 4th January 2021 and that he worked under exhibit P2 for two years. PW1 also testified that, exhibit P3 was employment agreement and further that, he was not given reasons for revocation of his vetting. While under re-examination, PW1 testified that, no vetting was required in implementing exhibit P3.

On the other hand, it was evidence of Msingo Mkanzabi (DW1)the Chief Manager Human Resources, the only witness for the respondent, that, in 2027, respondent signed exhibit P1 with the applicant showing that it is subject to BOT vetting. DW1 testified further that, on 15th September 2017, respondent obtained vetting from BOT (exhibit D1) with no objection the applicant to be employed as Managing Director of the respondent. DW1 testified further that, exhibit D1 had a condition that approval will be valid provided, applicant remain to be fit and proper person during tenure of his appointment.

DW1 also testified that, after expiry of exhibit P1, a renewal was issued and the parties extended the contract of employment for four years(exhibitP2) and that, salary of the applicant among other things, was increased. DW1 stated that, after expiry of exhibit P1 and entering into four years fixed term contract(exhibit P2) respondent did not seek approval from BOT because on 15th September 2017, approval was

issued in favour of the applicant. DW1 further testified that, the parties entered exhibit P3 that shortened the period of contract of four years (exhibit P2) that was expected to expire on 31st December to 30th June 2023. DW1 further stated that, exhibit P3 was frustrated because on 5th December 2022, BOT served respondent with revocation of vetting of the applicant(exhibit D2). That, based on exhibit D2, on 16th December 2022, the Board of Directors meeting was held and issued cessation of employment contract of the applicant (exhibit P7). It was further evidence of DW1 that, applicant was only entitled to be paid the agreed amount in the mutual agreement to terminate contract had he worked until on 30th June 2023.

While under cross examination, DW1 testified that, exhibit P3 is a contract of employment that terminated employment of the applicant. DW1 further stated that, there is no clause in the said exhibit P3 requiring vetting to be done.

Having considered evidence of the parties as pointed hereinabove, it is my view that, DW1 in testifying that exhibit P3 was frustrated, departed from pleadings and issues that were drafted and agreed by the parties. The CMA record shows that, in her final written closing submissions, respondent relied on this court's decision in the case of ***Karim s/o Babu Bablia***, Consolidated Labour Revisions No. 12 & 13 of

2020 (unreported) and argued that, the contract of employment between the parties was frustrated. As pointed out hereinabove, in the award, the arbitrator held that vetting of the applicant was necessary and that contract of the applicant was frustrated after revocation of vetting of the applicant and dismissed the dispute.

It is plain as I have pointed hereinabove that, only two issues namely, (i) whether there was breach of contract of the applicant and (ii) to what relief(s) are the parties entitled to, were drafted, and agreed by the parties. The issue of frustration of contract was never agreed by the parties as one of the issues which is why, in his evidence, applicant(PW1) said nothing relating to frustration of his contract. I should, at this juncture, state that, it is a settled principle in our jurisdiction that, parties are bound by their own pleadings and that they are not allowed to depart therefrom. In fact, the court itself is bound by pleading of the parties. There is a litany of case laws to that position. See the case of ***Astepro Investment Co. Ltd vs Jawinga Co. Ltd*** (Civil Appeal 8 of 2015) [2018] TZCA 278 (24 October 2018), ***Yara Tanzania Limited vs Ikuwo General Enterprises Limited*** (Civil Appeal 309 of 2019) [2022] TZCA 604 (5 October 2022), ***Ernest Sebastian Mbele vs Sebastian Mbele & Others*** (Civil Appeal 66 of 2019) [2021] TZCA 168 (4 May 2021), ***Salim Said Mtomekela vs***

Mohamed Abdallah Mohamed (Civil Appeal No. 149 of 2019) [2023] TZCA 15 (15 February 2023), ***Charles Richard Kombe t/a Building vs Evarani Mtungi & Others*** (Civil Appeal 38 of 2012) [2017] TZCA 153 (8 March 2017), ***Barclays Bank T. Ltd vs Jacob Muro*** (Civil Appeal 357 of 2019) [2020] TZCA 1875 (26 November 2020) and ***Registered Trustees of Islamic Propagation Center (ipc) vs The Registered Islamic Center (tic) of Thaaqib Trustees*** (Civil Appeal 2 of 2020) [2021] TZCA 342 (27 July 2021).

In the ***IPC's case*** supra, the Court of Appeal held inter-alia that:-

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."

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

"Any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored."

It was submitted on behalf of the applicant that, the arbitrator wrongly applied the doctrine of frustration of contract in the application at hand. On the other hand, it was submitted on behalf of the respondent that the issue of frustration of contract came out in evidence of the parties and that they made submissions thereof. It is my view that, both parties and the arbitrator were bound by the pleadings of the parties and they were not supposed to depart therefrom. In fact, in the CMA F1, applicant said nothing in relation to frustration. More so, respondent, in the opening statement said nothing relating to frustration of exhibit P3. In fact, in her opening statement, respondent raised two issues namely, (i) whether the reason for cessation of the employment contract was valid and (ii) to what relief are the parties entitled. On the other hand, in his opening statement, applicant raised two issues namely, (i) whether Mutual Agreement regarding termination of Employment has been breached by the Respondent and (ii) to what relies(s) are the parties entitled to. I should point out that, the parties filed the opening statement to comply with the provisions of Rule 24(1) of the Labour Institutions(mediation and Arbitration Guideline) Rules, GN. No. 67 of 2007. I should also point out that, the said opening statements are not evidence unless admitted by the parties as clearly provided by Rule 24(2) of GN. No. 67 of 2007(supra). The said opening

statements only helps the arbitrator to narrow down issues between the parties and eliminate evidence that is not relevant to the factual dispute as provided by Rule 24(4) of GN. No. 67 of 2007(supra). It is my further view that, both the parties and the arbitrator, drafted the two issues namely, (i) whether there was breach of contract of the applicant and (ii) to what relief(s) are the parties entitled to, in compliance with the provisions of Rule 24(1), (2) and (4) of GN. No 67 of 2007 and in the understanding that, parties will adduce evidence to prove those issues only.

From the foregoing, it is my considered opinion that, respondent was not supposed to introduce in her evidence, the issue of frustration of Mutual Agreement Regarding Termination of Employment (exhibit P3). It is my further considered view that, the arbitrator was bound by pleadings of the parties and the issues drafted and agreed. In my view, the arbitrator was supposed to confine the award in the framed and agreed issues as it was held in the case of ***James Funke Ngwagilo v. the Attorney General*** [2004] T.L.R 161. The arbitrator was only supposed to depart from the framed and agreed issues if (i) the parties were aware of the issue, (ii) they lead evidence relating to the said issue and (iii) they left the issue to the arbitrator for determination. In fact, that is the position of the law obtained in the case of ***Erastus Vicent***

Mtui vs COCA COLA Kwanza Limited (Consolidated Civil Appeal No. 619 of 2022 & 13 of 2023) [2024] TZCA 122 (23 February 2024). In the application at hand, the issue of frustration of contract was raised by the respondent in evidence of DW1. In my view, in raising that issue in her evidence and knowing that applicant has closed her evidence and has no room to adduce evidence to counter, cannot, by any rate, be said that both parties were aware and that, they adduced evidence. in fact, it is only the respondent that adduced evidence relating to frustration. In short, evidence relating to frustration was not adduced by both parties.

Again, in the written submissions, it is only the respondent who, in raised the issue of frustration of contract of the applicant. It cannot be said, in my view, that, applicant left the issue frustration of contract to be decided by the arbitrator. I am of that view because, according to CMA record, on 23rd August 2023, the parties were ordered to file their closing submission on 13th September 2023. In other words, submissions were supposed to be filed by the parties on the same date, as such, it cannot be said that applicant willfully, failed to submit on that issue or that he left that issue to be decided by the arbitrator. The position would have been different, in my view, had the parties and the arbitrator framed frustration of contract as an issue, evidence led by either of the parties and submissions made thereon by the respondent as she did, but

applicant failed to make submissions thereon. But that is not what happened in the application at hand. Therefore, it is my considered view that, applicant was unaware of that issue. In short, conditions enunciated in ***Mtui's case*** (supra) were not mate.

For the fore going, the arbitrator was not, in my view, supposed to entertain the issue of frustration of Mutual Agreement Regarding Termination of Employment (exhibit P3) which, as I have pointed hereinabove, was not among the agreed issues. In short, arbitrator was supposed to ignore evidence of DW1 relating to frustration of exhibit P3 because respondent departed from pleadings of the parties. That said, I hereby hold that, the arbitrator erred to hold that exhibit P3 was frustrated after revocation of vetting of the applicant.

It was testified by DW1 that, exhibit P3 only shortened life span of the four years fixed term contract(exhibit P2) that was expected to expire on 31st December 2024 to 30th June 2023. Based on that evidence, it was submitted by counsel for the respondent that, revocation of applicant's vetting (exhibit D2) frustrated implementation of the applicant's employment contract(exhibit P2). With due respect to counsel for the respondent. That argument cannot be valid for two reasons. One, frustration of contract though was supposed to be an issue, it was not an issue between the parties as I have held

hereinabove. Two, in the Mutual Agreement Regarding Termination of Employment (exhibit P3), the parties agreed to terminate employment contract between applicant and the respondent (exhibit P2) and set out entitlement of the respondent. My conclusion that exhibit P3 terminated employment contract of the applicant is fortified by the wording of exhibit P3 itself and previous conducts of the parties when they entered three years fixed term contract of employment(exhibit P1).

Starting with the wording of the Mutual Agreement Regarding Termination of Employment (exhibit P3), it is clear, as the heading itself reads, it was an agreement to terminate the four years fixed term contract (exhibit P2) and not to shorten its life span as it was testified by DW1. I am of that view because the preamble reads in part that:-

> **"WHEREAS**, the Managing Director had an employment agreement *with the Bank that commenced on 1st January, 2021 and was to end on 31st December 2024 (hereby referred to as the "**Amployment Agreement**")*
>
> ***WHEREAS**, the Managing Director and the Bank's Board of Directors engaged in an amicable and mutual discussions and consultations and reached an understanding (sic) that the employment agreement should be mutually terminated in accordance with Rule 3(2) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007(GN. No. 42 of 2007.*
>
> ***AND WHEREAS** the Bank and the Managing Director wish to amicably separate without injuring each other's reputation and provide a better environment for business to the bank and career for the Managing Director; and*

WHEREAS *the Managing Director and the Bank have reached a mutual agreement to cease the employment agreement that the Managing Director had with the Bank based on terms and conditions set out hereunder:-*

…"

It is my view that, the wording of exhibit P3 and previous conducts of the parties, the four years fixed term contract of employment (exhibit P2) was terminated. I am of that view because, on 11th August 2017, applicant signed three years fixed(exhibit P1) and agreed that taking over by the applicant as Managing Director commenced on 15th October 2017 and that appointment as Managing Director was effective from 2nd January 2018. I see no difference between exhibit P1 wherein the parties signed the contract of employment, but effectiveness of the contract was in later days and P3 wherein the parties agreed that effective termination will be on 30th June 2023 that was also a future date like what happened in exhibit P1. It is my further considered opinion that, under the parol evidence rule, that is to say, that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by oral evidence that adds to, varies, or contradicts the writing. See the case of ***Leah D. Kagine vs The Registered Trustees of Bugando Medical Center*** (Civil Appeal No. 327 of 2021) [2023] TZCA 17959 (14 December 2023). See also section also section 100 of the Evidence Act, [Cap 6 R.E. 2019]. The exceptions to that rule

are that, (i) oral evidence is proving subsequent modifications of the written contract, (ii) oral evidence proves evidence of intentional misrepresentations by one of the a parties to the written contract, (iii) oral evidence is correcting errors in drafting the written contract, (iv) oral evidence is clarifying ambiguities and filling in gaps in the written contract and (v) oral evidence supplements to a partially integrated written contract. In the application at hand, evidence of DW1 does not fall in any of the aforementioned exceptions.

It is my view that, the wording and the intention of the parties in signing exhibit P3 was to terminate the four years fixed term contract of employment (exhibit P2) and not to vary the life span of exhibit P2. It is my further considered opinion that, based on the conduct of the parties in the three years fixed term contract (exhibit P1), by exhibit P3, the parties terminated the four years fixed term contract (exhibit P2) and that, the contract that was existing at the time of revoking applicant's vetting is exhibit P3 and not the Four years fixed term contract (exhibit P2). For the foregoing, I agree with submissions by counsel for the applicant that, what was breached is the Mutual Agreement Regarding Termination of Employment (exhibit P3) and not the four years fixed term contract(exhibit P2) that was already terminated by exhibit P3. It is simple logic, in my view, that, what has been terminated cannot be

breached. It is my considered opinion that, you cannot terminate a none-existing contract.

It is my opinion that, had the parties intended to shorten the period of the fixed term contract (exhibit P2) to the lesser period as testified by DW1, they could have so expressly stated in exhibit P3. To the contrary, in exhibit P3, the parties stated that they agreed to cease employment and cited Rule 3(2)(a) of GN. No. 42 of 2007(supra). I have read the said Rule 3(2)(a) of GN. No. 42 of 2007(supra) and I am of the considered view that, the parties agreed to terminate employment as I have held hereinabove. The said Rule 3(2)(a) of GN. No. 42 of 2007(supra) provides:-

> *"3(2)(a) A lawful termination of employment under the common law shall be as follows-*
> *(a) termination of employment by agreement;"*

It is undisputed by the parties that exhibit P3 was signed on 16th November 2022. According to clause 1.1 and 2.1 of exhibit P3, the parties agreed that, 30th June 2023 was effective termination date of employment contract of the applicant(exhibit P2). I have read clause 2.3 of exhibit P3, and find that, applicant was supposed to handle over the office on or before 30th June 2023. In my view, by the wording of exhibit P3, applicant was at liberty to handover the office at any period but not

after 30th June 2023. It is also undisputed by the parties that, in exhibit P3, parties agreed *inter-alia* that, applicant was supposed to be paid Four Hundred and Thirty Million Tanzanian Shillings (TZS 430,000,000/=). I have read the terms which the parties agreed in exhibit P3 and I am of the considered opinion that the parties terminated exhibit P2.

It was submitted that, after signing exhibit P3, applicant was working in a transition period. I totally agree because clause 4.1.4 provides:-

> *"4.1.4 During the period commencing from the date of signing of this agreement and ending on termination date(**the transition period**; the Managing Director shall ensure that the Bank maintains a performing loan book with non-performing loans that is within the Managing Director's Balance score card and shall provide monthly loan performance reports to the Bank's Board including a list of all loans issued on each month."* (Emphasis is mine).

Again, in clause 13.1 and 13.2 the parties agreed that exhibit P3 replaced all other previous agreements and any waiver of exhibit P3 shall be in writing. The said clause provides:-

> *"13.1 This Agreement shall constitute the entire agreement between the parties and shall replace any and all previous agreements between the Parties as regards its subject matter.*
>
> *13.2 The provisions of this The (sic) Agreement shall not be waived without the written consent of all the Parties hereto."*

The quoted clause 4.1.4 and 13.1 of exhibit P3 supports my finding that, the four years fixed term contract(exhibit P2) between the parties was terminated by exhibit P3 and that, the contract that was breached is the Mutual Agreement Regarding Termination of Employment (exhibit P3).

It was submitted by counsel for the applicant that, the right to terminate the contract was not of the BOT but of the parties who were supposed either, to agree or to follow procedures of termination. It was testified and argued on behalf of the respondent that, the said contract was frustrated by revocation of vetting of the applicant by BOT. As I have pointed out hereinabove, evidence and submissions relating to frustration of the said contract cannot be entertained in this application for the reasons pointed out. I therefore agree with submissions by counsel for the applicant that, the right to terminate the said contract was between the applicant and the respondent and not BOT. I should point out that, BOT did not terminate the contract of the applicant, rather, revoked vetting of the applicant only. I have pointed herein above that, by exhibit P3, the parties agreed to terminate employment contract of the applicant(exhibit P2) at the time of signing exhibit P3. What was remaining between the parties is execution of the agreement to terminate exhibit P2. In my view, cessation of employment contract

(exhibit P7) dated 16th December 2022 purporting to terminate employment contract of the applicant is nothing so to speak, because, it attempted to terminate the contract of employment which the parties had already mutually terminated by exhibit P3. The least respondent was supposed to do after revocation of the applicant's vetting by BOT, was either to renegotiate with the applicant or pay the applicant in accordance with exhibit P3.

In fact, in the case of ***STANBIC Bank T. Limited vs Iddi Halfani*** (Civil Appeal No.139 of 2021) [2023] TZCA 17496 (11 August 2023) the Court of Appeal held *inter-alia* that:-

> *"…the Central bank discharges its duty as overseer or regulator o banks and financial institutions. This statutory relationship is limited to the regulator and the bank or financial institution concerned.*
>
> *On the other hand, there is a contractual relationship between the bank and the employee. Under the law of contract, the rights and obligations due under a contract acclimatize for the benefits of the parties to the contract. Therefore, under the parties' contract, the right to determine whether to terminate an employment lies with the parties to the contract.*
>
> ***Since the employment contract between the appellant and Iddi Halfani exists for the benefits of the two parties only, the Bank of Tanzania as a third party is not linked to issues relating to the engagement or disengagement of the bank's employees which are best left to the parties. It is therefore expected for the bank to follow due process in honouring its contractual obligations with the respondent employee.***" (emphasis is mine).

It was submitted by counsel for the respondent that dispute between the parties related to breach of contract and not termination of contract and further that, the issue of procedure of termination cannot apply because it was not pleaded by the applicant in CMA F1. With due respect to counsel for the respondent, the fixed term contract of employment(exhibit P2) was already terminated by exhibit P3. What was remaining between the parties was execution of the terms of termination. Assuming that the contract of employment (exhibit P2) at that time had not been terminated, then, the dispute of breach of contract was maintainable. The complaint by the applicant in this application is breach of the Mutual Agreement Regarding Termination of Employment (exhibit P3) that relates to his employment. In short, it is breach of exhibit P3 that resulted into none payment of terminal benefits agreed in exhibit P3. It is my view that, respondent in issuing cessation of contract of employment (exhibit P7) that revocation of applicant's vetting by BOT made the existing employment relationship between the two inoperative, has two interpretations. One; if respondent was referring to the fixed term contract of employment(exhibit P2) of which, that is the likelihood, that was a misdirection because the said contract was already terminated by exhibit P3. Two, if respondent was referring to the Mutual Agreement Regarding Termination of Employment (exhibit

P3), that is correct. But I should point out that, what was made inoperative is the transition period. I should point out that, in the transition period, applicant was supposed to remain as fit and proper person as a condition to all top managers in the Banking industry. Therefore, by implications, vetting was necessary. But the unanswered question is, was vetting necessary only after signing of exhibit P3 or when did applicant became not fit and proper person. That evidence is wanting in the CMA record.

It was testified by the applicant(PW1) that he was not given reasons for revocation of his vetting. That evidence was not contradicted or challenged by the respondent. I find that evidence as true. I have read a letter dated 1st December 2022 from the Bank of Tanzania directed to Ms. Zawadia Nanyaro, the Acting Board Chairperson of DCB Commercial Bank Plc titled "UPDATE ON LEADERSHIP MATTERS AT DCB COMMERCIAL BANK PLC" (exhibit D2) and find that, there were fraudulent actions relating to deposit commission and misreporting of regulatory reports committed by junior staff and that disciplinary hearing was going on. In the said exhibit D2, BOT directed respondent to conclude disciplinary hearing against junior staffs involved by 31st March 2023. Exhibit D2 revoked vetting of the applicant and other two senior staffs but it did not state reason for revocation of vetting of the applicant

and the other two senior staff. It is my view therefore, that there is no evidence on record showing reasons for revocation of applicant's vetting leading to termination of the transition period consequently, none-payment of terminal benefits agreed in exhibit P3.

In my view, exhibit P3 being an agreement arising from employment contract, respondent was not supposed to terminate it unfairly. In ***Idd's case*** (supra), the Court of Appeal quoted with approval the decision in the case of ***Mahmud v. Bank of Credit and Commerce International SA*** (1988) AC 20 that:-

> " …an employment contract is subject to implied terms that the *employer may not, without reasonable and proper cause, conduct himself /herself in a manner likely to destroy or seriously damage the relationship of confidence and trust between them."*

Much as respondent had a valid reason based on revocation of applicant's vetting by BOT, she was supposed to trade within the ambit of their agreement in exhibit P3. It is my further view, as I have pointed hereinabove that, after revocation of applicant's vetting, respondent was supposed to renegotiate with the applicant and agree, in terms of clause 13.2 of exhibit P3, to waive some of the provisions including but not limited to terminal benefits on ground that the transition period cannot be implemented. Unfortunately, that was not done. In lieu thereof, respondent served applicant with a letter(exhibit P7) terminating

employment contract(exhibit P2) while the said employment contract was already terminated by exhibit P3. I am of that view because, under clause 9.1 of exhibit P3, the parties agreed that:-

> *"9.1. If any of the provisions of this agreement are unenforceable then such unenforceable provisions shall be deemed to be severed from this Agreement and the remaining provisions of this Agreement will continue of full force and effect, as between the parties."*

It is my view that, respondent was bound to implement what she agreed with the applicant in exhibit P3 and under sanctity of contracts, this court has to ensure their agreement is implemented. See for example the case of ***Simon Kichele Chacha vs Aveline M. Kilawe*** (Civil Appeal 160 of 2018) [2021] TZCA 43 (26 February 2021), ***David Nzaligo vs National Microfinance Bank Plc*** (Civil Appeal 61 of 2016) [2019] TZCA 287 (9 September 2019), ***Phlipo Joseph Lukonde vs Faraji Ally Saidi*** (Civil Appeal 74 of 2019) [2020] TZCA 1779 (21 September 2020). In ***Lukonde's case*** (supra), the Court of Appeal held *inter-alia* that :-

> *"We take any such deliberate breach of contracts very seriously. Once parties have duly entered into a contract, they must honour their obligations under that contract. Neither this Court, nor any other court in Tanzania for that matter, should allow deliberate breach of the sanctity of contract."*

In ***Nzaligo's case***(supra), the Court of Appeal stated:-

"It is important to note that the sanctity of the employment contract cannot be gainsaid."

In the application at hand, no evidence was brought as to what the parties discussed and agreed in relation with implementation of terms of exhibit P3 after revocation of applicant's vetting. In short, there is no evidence as to whether their discussion altered the mutual agreement regarding termination of employment(exhibit P3). There is no evidence showing what was agreed by the parties in the Board meeting that was held on 16th December 2022 and whether the terms in exhibit P3 was altered or not. In absence of that evidence, parol evidence rule should apply against the respondent. In my view, nothing material affected exhibit P3, because had the partied discussed and altered the terms in exhibit P3, the parties would have adduced that evidence at CMA. In my view, absence of that evidence means that the parties intended, to be bound by the terms of the mutual agreement regarding termination of employment(exhibit P3).

It is my view that, after operation of the transition period in exhibit P3 was made impossible after revocation of applicant's vetting, in absence of evidence altering terms in exhibit P3, respondent was

supposed to pay the applicant the agreed amount. See also what was held by the Court of Appeal in the case of ***Muhimbili National Hospital vs Linus Leonce*** (Civil Appeal 190 of 2018) [2022] TZCA 223 (28 April 2022).

For the foregoin, I hold that, the parties were bound by the terms of the Mutual Agreement Regarding Termination of Employment (exhibit P3). In exhibit P3, the parties agreed under clause 3.1 the remuneration package of the applicant on termination is TZS 430,000,000/=. It was agreed by the parties under clause 4.1.14 that the agreement was entered into as full and final settlement of all claims whatsoever for fairness or otherwise of termination of the applicant. Therefore, after termination of exhibit P3 by whatever reason including revocation of vetting of the applicant by BOT making the transition period inoperative, then, applicant is entitled to be paid the agreed amount.

For all what I have discussed hereinabove, I find that, the arbitrator erred in dismissing the claims by the applicant. I therefore, allow this application and order that applicant be paid TZS 430,000,000/= as agreed in exhibit P3 and be issued with a Certificate of Service. Applicant shall be paid the said amount of TZS 430,000,000/= subject to outstanding loan deductions as agreed in clause 3.5 of exhibit P3 and

any other amount that applicant was paid after termination of exhibit P3.

Dated in Dar es Salaam on this 15th March 2024.

B. E. K. Mganga
JUDGE

Judgment delivered on this 15th March 2024 in chambers in the presence of Roman Masumbuko, Advocate for the Applicant also the applicant present and Geofrey Paul, Advocate for the Respondent.

B. E. K. Mganga
JUDGE