**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: NDIKA, J.A., SEHEL, J.A. And KHAMIS, J.A)**

**CIVIL APPEAL NO. 139 OF 2021**

**STANBIC BANK (T) LIMITED..... APPELLANT**

**VERSUS**

**IDDI HALFANI.....RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania**
**(Labour Division at Dar es Salaam)**

**(Muruke, J)**

**dated 14th December 2020**

**in**

**Labour Revision No. 858 of 2019**

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## JUDGMENT OF THE COURT

12th July & 11th August 2023

**KHAMIS, J.A.:**

Paragraph 12.0 of the Employment Contract between Stanbic Bank (T) Ltd and Iddi Halfani, signed by the parties on 1st March and 8th March 2017 respectively, provides that:

***"12.0 Termination of Employment***

*Either party may terminate this agreement by giving the other one (1) months' notice in writing of intention to terminate it or pay/forfeit one (1)*

*month's salary in lieu of such notice. However, the Bank reserves the right to terminate you without such notice or payment in lieu thereof in line with the Employment and Labour Relations Act, 2004 (as amended from time to time)."*

Iddi Halfani, the respondent herein, contends that on the basis of the employment contract, he was unfairly terminated from employment by the bank, the appellant herein, on unjustified ground of failure to meet the central bank's regulatory requirements.

In a dispute lodged at the Commission for Mediation and Arbitration of Dar es Salaam on 30th November 2018, Iddi Halfani challenged his summary dismissal on the basis that it was unlawful, as in his view, there was neither fairness of the procedure nor validity of the reason.

He also took issue with the bank's action of terminating him for failure to take into account his clean record of employment with outstanding performance. He contended that there was neither verbal nor written warning issued by the bank throughout his employment history to justify an utterly shocking termination decision.

He asserted lack of consultation prior to the termination hence breach of rules of natural justice.

Iddi Halfani sought an order of compensation for unfair termination being forty-eight (48) months remuneration, general damages for mental torture, inconvenience, professional and personal reputational damage, payment of severance pay, payment in lieu of notice, accrued gross salary up to departure date, and accrued unused entitlement leave up to departure date.

Stanbic Bank opposed the claim. It asserted that the employee was terminated on justified grounds of regulatory requirements and maintained that Iddi Halfan's employment as Head of Information Technology, was subject to terms and conditions including vetting and approval by the Bank of Tanzania (BOT) which required him to continue be a fit and proper person throughout his employment.

The bank contended that whereas on 30th April 2018, it received a letter of no objection from the Bank of Tanzania for appointment of Iddi Halfani as its Head of Information Technology, the situation turned sour on 12th November 2018 when the regulator issued a fresh letter stating that

the employee was no longer fit and proper to continue with his position in the bank.

The bank further contended that it was instructed by the Bank of Tanzania to immediately relieve the employee from his duties hence the termination.

In a further reply, the bank stated that based on the laws and regulations governing banks and financial institutions in the country, it was bound to comply with orders of the central bank as it did and thereby provided severance pay, salary in lieu of notice, unpaid salaries which accrued up to the date of termination and remittance in lieu of accrued leave which was yet to be utilized.

The documents on record show that Iddi Halfani was employed by Stanbic Bank (the bank) as its Head of Information Technology with effect from 18th April 2017 until terminated on 19th November 2018 on regulatory requirements.

It was a term of the parties' contract that the employee was to comply with the Code of Conduct Policy. In addition, he was expected to conduct himself with sobriety, out of as well as in business hours, and not

at any time be guilty of any act which may be such as might bring him or the bank into disrepute.

The termination letter was headed: **"...termination of your employment on regulatory requirements"** and stated that the employee was found no longer suitable to continue holding a senior management position with the bank. The bank relied on the letter by BOT dated 12th November 2018.

At the hearing of the dispute, the bank lined up three witnesses, namely: DW 1 Eutropia Vegula, Head of Stanbic's Human Resources Department, DW 2 Sara Eliufoo, BOT official in the Banking Supervision Department and DW 3 Edmund Msuya, a lawyer and Head of Stanbic's Compliance and Financial Crimes Department.

On the other hand, PW 1 Iddi Mohamed Halfani was the only witness for the employee.

At the close of trial, the arbitrator (Grace Wilbard Massawe) found the termination unfair both substantively and procedurally. She was of the view that twenty - four (24) months remuneration was reasonable and appropriate as compensation for unfair termination. However, she rejected a claim for damages on the ground that it was not sufficiently proved.

Disgruntled, Stanbic Bank opted for revisional proceedings in the High Court, Labour Division. In the affidavit in support of the Chamber Summons, the bank's principal officer averred that the arbitrator erred in law and fact by failing to order joining of the Bank of Tanzania as a respondent in the dispute, by holding that Iddi Halfani was unfairly terminated, that there was lack of fair and valid reason for termination, for failure to consider the vetting process which was in the hands of BOT and for awarding the employee 24 months salaries as compensation for unfair termination, a sum that was allegedly excessive given circumstances of the case.

Upon consideration of the parties' arguments and examination of the evidence on record, the revisional Judge concluded that the bank had a statutory duty to BOT and contractual duty with the employee and thus could only effect termination on good ground and upon following laid down procedures.

As regards to a prayer for relief, the learned Judge found an award of twenty - four (24) months' salaries compensation was justifiable in terms of Section 40(1)(c) of the Employment and Labour Relations Act because the employee was rendered unfit without disclosing reasons for unfitness.

On assertion that the trial arbitrator erred in law and fact on failure to order joining of the Bank of Tanzania as a party to the dispute, the learned Judge established that BOT was not a necessary party and faulted the bank for failure to move the arbitrator for such joining.

In addition, the revisional Judge was convinced that the bank as an employer did not act prudently in failing to discuss with the employee on contents of the BOT letter and its consequences in order to agree on the way forward allegedly because the letter did not order an outright termination.

Further, the learned Judge faulted the employer for failure to inquire from the Bank of Tanzania on details of the alleged negative issues regarding the employee. Identifying the bank's failure to successfully mediate and or settle the case while acknowledging that it breached the employee's fundamental right to be heard as a shortfall, the Labour Court concluded that the employer had intentionally abused the court process and its claim was frivolous and vexatious. To that end, it awarded costs to the employee.

Dissatisfied with the findings, the bank resolved to pursue the present appeal premised on five grounds all geared to fault the learned

Judge for holding that the arbitrator was not duty bound to join the Bank of Tanzania as a party to the dispute, failure to address the facts in issue regarding BOT instruction to the bank, for upholding CMA award on unfairness of termination, for failure to conclude that the letter from BOT ordered the bank to terminate the employment and for holding that an application for revision by the bank was frivolous and vexatious hence an award of costs.

Before us, the bank was represented by Mr. Anthony Arbogast Mseke, learned advocate, while Ms. Ernestilla John Bahati, also learned advocate, was entrusted with the respondent's brief.

Mr. Mseke sought our indulgence to adopt the appellant's submissions earlier on filed in terms of Rule 106(1) of the Tanzania Court of Appeal Rules and thereby highlighted salient areas of the dispute as therein stated. He urged this Court to allow the appeal. Expounding, the learned advocate faulted the learned Judge for holding that the arbitrator was not duty bound to order joining of the Bank of Tanzania as a party to the dispute regardless of the import of Rule 24(2) of the Labour Institutions (Mediation and Arbitration) Guidelines G.N No. 64/2007.

He contended that despite of the requirement under Rule 24(3)(b) of GN 64 for a party to move the Commission for an order to join another party to the proceedings, Rule 24(2) requires a mediator or an arbitrator to order joining of a party to the proceedings.

He reasoned that condition precedent before the Commission or a party is burdened to invoke Rule 24(3)(a)(b) and or Rule 24(2) of GN No. 64/2007 is to consider that a party or person to be joined has a substantial interest in the matter of the proceedings.

He further contended that since parties had in their respective opening statements indicated that the BOT had given an order which resulted to termination of the employee, it was necessary for the arbitrator to halt proceedings at that stage and order joining of the BOT.

The learned advocate relied on decisions of this Court in **TANZANIA RAILWAYS CORPORATION (TRC) v GBP (T) LTD**, Civil Appeal No. 218 of 2020 and **TANG GAS DISTRIBUTORS LTD v MOHAMED SALIM SAID AND TWO OTHERS, Revision No. 6/2011** (both unreported) wherein it was held that once it is discovered that a necessary party has not been joined in the suit and neither party is ready to apply to have him

added as a party, the Court has a separate and independent duty from the parties to have him added.

On the second ground of appeal, Mr. Mseke said it was irrelevant for the Labour Court to engage into detailed justification of the respondent's termination while ignoring a fact that the Bank of Tanzania as a regulator had given instructions which culminated to termination of the employment.

On the third ground of appeal, the appellant's counsel contended that having found the Bank of Tanzania had communicated on existence of negative information regarding the employee, it was unavoidable for the arbitrator to order joining of the Bank of Tanzania in terms of Rule 13 (11) of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007.

On the fourth ground of appeal, Mr. Mseke contended that the learned Judge erred in law and facts in holding the letter from the Bank of Tanzania did not order the appellant to the terminate the respondent's employment. He submitted that the letter required the appellant to extinguish the respondent's job with immediate effect which meant immediate termination of services.

On the last ground of appeal, the learned counsel for the appellant asserted that it was a misdirection on part of the learned Judge to quote with approval a position paper on award of costs prepared by an officer in the Commission for Mediation and Arbitration, an inferior body to the Labour Court.

He cited Rule 31(2) and (3) of the Labour Institutions (Mediation and Arbitration Guidelines) GN No. 67 of 2007 on the award of costs where a party or person acts in a frivolous manner.

He contended that the rules defined vexatious manner to mean a party or person who institutes proceedings against another person on insufficient grounds with an intention of troubling that party and asserted that the learned Judge awarded costs in the circumstances that did not fit with the stated legal requirements. He urged this Court to set aside the order for costs on the ground that it was unjustified.

In reply, Ms. Ernestilla Bahati who did not have written submissions, respectfully asserted that the letter by the Bank of Tanzania as reflected in page 264 of the records of appeal, did not do away with the bank's role as an employer to follow the procedure for termination.

She submitted that the letter did not direct or order the bank to terminate the employee's as alleged by the appellant. To back up her contention, she referred to testimony of Sara Eliufoo (DW 2) and of DW 1 Eutropia Vegula as reflected in page 195 of the records of appeal.

The learned counsel contended that the bank neither afforded the employee with an opportunity for discussion nor consulted him on the impending decision to terminate his services.

Ms. Bahati submitted that it was a misconception on the bank to think that the letter from BOT had relieved it of the duty to follow the laid down procedures for termination of employment.

On joining the Bank of Tanzania as a party, she asserted that the appellant misconceived its assertion as BOT was not a necessary party on whose absence it was impossible to adjudicate the dispute or determine issues under consideration.

The learned counsel for the respondent charged that Civil Application No. 218 of 2020 cited by the appellant was distinguishable in the circumstances of the case because it was not decided in a labour dispute and urged us not to accord any weight on its citation.

The learned counsel drew our attention to Regulation 24(1) of GN No. 64/2007 which requires the Commission for Mediation and Arbitration to only join a party or parties depending on whether the relief sought depends on same questions of law and facts. She faulted the appellant for failure to move CMA to order joining of BOT in case it was convinced that its presence was necessary.

The learned counsel added that the appellant wrongfully presented that prayer (of joining BOT) at the High Court, when the case was set for revision instead of addressing the same at the trial stage before the Commission.

With leave of the Court, Ms. Bahati addressed us on the right to be heard as discussed by this Court in **DAVID NZALIGO v NATIONAL MICROFINANCE BANK PLC,** Civil Appeal No. 61 of 2016 (unreported) wherein at page 24 of the typed Judgment, this Court held that:

> *"The law that no person shall be condemned unheard is legendary. It is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even if*

*the same decision would have been arrived*

*at had the affected party been heard."*

Grounding her reasoning on the above reproduced holding, the respondent's counsel invited us to find that a letter from the Bank of Tanzania unfairly failed to disclose reasons for its directions which amounted to denial of the right to be heard.

Ms. Bahati submitted that it was a duty of the appellant to seek clarifications from the Bank of Tanzania in order to establish the actual reasons for its directives. Further, she contended that the appellant as an employer, unreasonably failed to discharge his duty to assign good and fair reason which led to the respondent's unfair termination.

By way of rejoinder, Mr. Mseke reiterated his earlier submissions and moved the Court to allow the appeal as presented.

The learned counsel submitted that the appellant had sufficiently provided a fair reason for termination and adhered to mandatory requirements of the law hence the termination of employment was both procedurally and substantially sound.

On the five grounds of appeal, we have identified three main issues to be tackled: whether the respondent's termination was substantively and procedurally justified, whether joining of the Bank of Tanzania as a party in the dispute was necessary and what reliefs are parties entitled to.

We propose to start with the first issue regarding substantive and procedural fairness of termination. In the course of addressing this issue, we shall also get to grips on the second issue, namely: whether the Bank of Tanzania is a necessary party to these proceedings.

Substantive fairness relates to the existence of a fair reason to terminate. Procedural fairness relates to the procedure followed in terminating an employee. In relation to substantive fairness the question is whether or not, on the evidence before the court, and not on the evidence produced during disciplinary hearing or consultation process, a fair reason to terminate existed. With regard to procedural fairness, the question is not whether a fair procedure was followed in court or CMA. The question is whether, prior to the termination, the employer followed a fair procedure.

The result to the above is that, If the evidence placed before the court establishes a fair reason to terminate which was present at the time of the termination, the termination is substantively fair. It does not matter,

for purposes of determining the substantive fairness of the termination, that such reason was not the subject of discussion during the disciplinary hearing or consultation process. The fact that the reason for termination was never a subject of discussion during the hearing or consultation matters only at the level of procedure because in terms of section 38(1)(b) of the ELRA and rule 13(5) of the Code of Good Practice, it should be a subject of discussion.

In this regard, we have considered the various documents filed in the Commission for Mediation and Arbitration, and in the Labour Court, exhibits produced during trial, oral testimonies of witnesses and rival submissions by the parties' counsel.

The law on termination of employment contracts in Tanzania is largely governed by the Employment and Labour Relations Act No. 6 of 2004 (ELRA) and the Employment and Labour Relations (Code of Good Practice) Rules, 2007 (Code of Good Practice). The most relevant provisions in this respect are Sections 36, 37, 38, 39, 40, 41, 42 and 44 of the Act.

Section 36 of the Act provides that:

*"36 For purposes of this Sub – Part:*

*(a) "termination of employment" includes:*

*(i) a lawful termination of employment under the common law*

*(ii) a termination by an employee because the employer made continued employment untolerable for the employee, and*

*(iii) a failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal*

*(iv) a failure to allow an employee to resume work after taking maternity leave granted under this Act or any agreed maternity leave; and*

*(v)A failure to re-employ an employee if the employer has terminated the employment of a number of employees for the same or similar reasons and has offered to re-employ one or more of them.*

(b) *"terminate employment" has a meaning corresponding to "termination of employment"*

Section 37 of the Act provides that:

*"37 (1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.*

*(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.*

*(3) It shall not be a fair reason to terminate the employment of an employee:*

*(a) for the reason that the employee:*

*(i) discloses information that the employee is entitled or required to disclose to another person under this Act or any other law.*

*(ii) fails or refuses to do anything that an employer may not lawfully permit or require the employee to do.*

*(iii) exercises any right conferred by agreement, this Act or any other law*

*(iv) belongs, or belonged, to any trade union, or*

*(v) participates in the lawful activities of a trade union, including a lawful strike.*

*(b) for reasons:*

*(i) related to pregnancy*

*(ii) related to disability, and*

*(iii) that constitute discrimination under this Act.*

*(4) In deciding whether a termination by an employer is fair, an employer, arbitrator or Labour Court shall take into account any Code of Good Practice published under Section 99.*

*(5) No disciplinary action in form of penalty, termination or dismissal shall upon an employee who has been charged with a criminal offence which is substantially the same until final determination by the Court and any appeal thereto."*

Section 38 of the Act reads:

*"38 (1) In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, he shall:*

*(a) give notive of any intention to retrench as soon as it is contemplated*

*(b) disclose all relevant information on the intended retrenchment for the purpose of proper consultations*

*(c)consult prior retrenchment or redundancy on:*

*(i) the reason for the intended retrenchment*

*(ii)any measure to avoid or minimize the intended retrenchment*

*(iii) the method of selection of the employees to be retrenched*

*(iv) the timing of the retrenchments, and*

*(v)severance pay in respect of the retrenchments.*

*(d) give the notice, make the disclosure and consult, in terms of this subsection, with*

*(i) Any trade union recognized in terms of Section 67*

*(ii)Any registered trade union with members in the workplace not represented by a recognized trade union*

*(iii) Any employee not represented by a recognized or registered trade union.*

*(2) Where in the consultations held in terms of sub-section (1) no agreement is reached between the parties, the matter shall be referred to mediation under Part VIII of this Act.*

*(3) Where the mediation has failed, the dispute shall be referred for arbitration which shall be concluded within thirty days during which period no retrenchment shall take effect and, where the employees are dissatisfied with the award and are desirous to proceed with revision to the Labour Court under section 91(2), the employer may proceed with their retrenchment."*

Our understanding of the excerpts above is that they seek to substantially regulate termination of employment contracts particularly by an employer. First, an employer may not terminate an employee except for good reason. Some of the grounds that constitute good reason under the Employment and Labour Relations (Code of Good Practice) Rules, GN No.

42 of 2007 include termination by mutual agreement, automatic termination, resignation, misconduct, incapacity, poor work performance, ill health or injury and incompatibility.

Section 38 of the Employment and Labour Relations Act and Rule 23 of the Employment and Labour Relations (Code of Good Practice) Rules provides that redundancy on operational requirements, popularly known as retrenchment or redundancy is another substantive ground for termination. This is where termination is done on operational requirements of the business such as economic, technological, structural or similar needs of the employer.

It is trite law that even where there exists substantive grounds to justify termination, the law requires the employer to observe certain procedural strictures to ensure compliance with the principles of natural justice in terminating services.

The employer is bound to provide an employee with details of the accusation to enable him/her respond to the charges, allow the employee to be represented by a trade union representative or fellow employee of his choice during hearing, and also provide an employee with decision of the disciplinary hearing either terminating or serving his services.

In case of retrenchment, an employer is required to ensure that he has considered all possible alternatives to termination before termination is effected. These include to consult with the affected employee on the reason for the intended retrenchment, possible measures to avoid or minimize the intended retrenchment such as transfer to other jobs, early retirement, voluntary retrenchment package and lay off.

Consultations also involve identification of criteria for selecting employees for termination such as last in first out (LIFO) or first in last out (FILO), timing of the retrenchments, payment of severance pay and other conditions on which terminations take place and steps to avoid adverse effects of the termination such as time off to seek work.

Where the employer fails to observe the foregoing, the resultant termination is deemed unlawful. It is important to observe that under Section 39 of the Employment and Labour Relations Act, the onus of proof or justifying the lawfulness of the termination both substantively and procedurally lies with the employer.

The circumstances obtained in the present case are unique and exceptional because none of the reasons for termination outlined in the Employment and Labour Relations Act and or the Employment and Labour

Relations (Code of Good Practice) Rules was applicable in terminating the respondent's services.

Heading of the letter of termination dated 19th November 2018 manifested that the employee is terminated on **Regulatory Requirements**. *"Termination on regulatory requirements"* is a new limb hitherto unknown on the list of reasons for termination of services in Tanzania and demonstrates role of the Bank of Tanzania as a regulator of other banks and financial institutions.

In light of the above, it is necessary to consider the legal implications when the Bank of Tanzania in the course of discharging its statutory duties, give orders or directions to a bank or financial institutions which it considers of national interest, to the extent of changing the statutory principles of labour law such as freedom of an employer to terminate an employment contract in line with the contractual terms.

The Bank of Tanzania exists in accordance to the Bank of Tanzania Act No. 5 of 2006 and is mandated inter alia, to ensure integrity of the financial system and support the general economic policy of the Government and promote sound monetary, credit and banking conditions conducive to the development of the national economy.

As part of its core functions, it regulates and supervises affairs of all banks and financial institutions in accordance to the Banking and Financial Institutions Act No. 5 of 2006.

The Banking and Financial Institutions (Licensing) Regulations, G.N No. 297 of 2014 requires the Bank of Tanzania to make assessment as to whether the proposed members of the Board of Directors and senior management of a proposed institution are fit and proper in accordance with the criteria set out in the First schedule to the Regulations.

In so doing, the Bank of Tanzania is required to evaluate the proposed members of the Board of Directors and senior management team with respect to their experience and ability to manage funds, work experience, formal education, professional qualifications, reputation, criminal record and conflict of interest (See Regulation 13 G.N No. 297 of 2014).

Regulation 19(1) provides that a bank or financial institution shall not appoint any person as senior manager or board member and assign him/her responsibilities unless it has obtained prior approval of the Bank of Tanzania.

The above stated legal provisions establishes that the Bank of Tanzania is statutorily interested in the employment of certain categories of persons who work in banks and financial institutions. In so doing, the central bank discharges its duty as overseer or regulator of 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.

With this discussion, we are satisfied that the Bank of Tanzania is not privy to the employment contracts entered by banks and other financial institutions and therefore not a necessary party to a labour dispute involving the appellant and the respondent herein, an assertion that was futilely advanced by the appellant's counsel. We think, this could only be possible if the employee had claims against the central bank other than those involved in this matter such as judicial review.

It is trite law as re-echoed in **MAHMUD v BANK OF CREDIT AND COMMERCE INTERNATIONAL SA (1998) AC 20** that an employment contract is subject to an implied term 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.

This common law position is in line with the ILO Convention No. 158 of 1982 which was domesticated through Sub - Part E of Part III to the ELRA. The same provides that the employment of a worker shall not be terminated unless there is a valid reason, and that the worker shall not be terminated on misconduct or non-performance before he is provided an opportunity to defend himself against the allegations.

It was not disputed that the letter dated 12th November 2018 directing the appellant to relieve the respondent of his duties, was issued by BOT in accordance with its statutory mandate. Similarly, record shows that the appellant acted on such instruction to terminate the respondent's services as Head of Information Technology.

We have examined the parties' employment contract and particularly clause 15.0 thereof which subjected the employee to other policies and procedures which regulates the appellant's business including pre-approval controlled function and supervisory role of the Bank of Tanzania. He was called upon to consult the Human Resource Department for further information.

On examination in chief by Ms. Ernestilla Bahati, Iddi Halfani expressed awareness of the BOT vetting requirement, thus:

> *".....kwa staff level za juu kupeleka details BOT ili kupata no objection to be done within six months of probation. Before confirmation in my position, I passed all stages. Respondent alinitaalifu*

*kuwa amepata no objection from BOT na hivyo ku-confirm engagement and vetting..."*

Having regard to the employee's awareness of the Banking and Financial Institutions (Licensing) Regulations and his personal involvement in the vetting exercise, we form an opinion that his remaining fit and proper throughout subsistence of the employment was a mandatory term and condition of employment.

This is further cemented by a letter from the Bank of Tanzania to the Managing Director of Stanbic Bank dated 30th April 2018 headed: *"Engagement and Vetting of Management Staff – Iddi Halfani"* which reads that:

*"Reference is made to your letter number DBS/HR/IT/2017 dated 5th December 2017 and other correspondences, regarding the captioned subject.*

*In reply, please be informed that Bank of Tanzania has no objection to the appointment of Mr. Iddi Halfani as Head of Information Technology*

*of your bank. The approval is subject to him continuing to be a fit and proper person during the tenure of his appointment.".*

Taking into account that section 33 of the Banking and Financial Institutions Act and regulation 42 of the Banking and Financial Institutions (Licensing Regulations) required the appellant to dutifully comply with and give effect to the directions of the Bank of Tanzania, we think, the employer sufficiently demonstrated that it acted on a good cause. This is to say that the High Court was not correct in its finding on this point.

The second limb of the first issue is on procedural fairness. At the outset, we observe that this a rare dispute concerning dismissal on fitness and probity in the regulated banking and financial sector whose procedure is not explicitly stated in the employment legislation. However, since its circumstances are substantially similar to termination on structural needs of the employer, we are of view that the procedure for termination on operational requirements as provided for under Section 38 of the ELRA and rule 23 of the Code of Good Practice, should, *mutatis mutandis*, be employed.

It was common cause before us that the ELRA, the Code of Good Practice and the appellant's Disciplinary Code & Procedure outlined a mandatory procedure for termination of employee's services which were never followed. The non compliance of the law and procedure was, in our view, fatal to the process of termination.

The last issue relates to reliefs that the parties are entitled to. Compensation is an important means of protecting employee's rights to fair labour practices, which derive from the Constitution and are given effect by the ELRA. It is therefore, trite law that unfair dismissal should earn an employee compensation in circumstances which preclude reinstatement.

In terms of section 40(1)(c) of the ELRA, if an arbitrator or Labour Court finds a termination is unfair, he or it may order the employer to pay compensation to the employee of not less than twelve months' remuneration. The operative word used is *"may"* meaning that the arbitrator or Labour Court is not obliged, but may order the employer to pay compensation of any amount not less than twelve months' remuneration. In exercising that discretion, the arbitrator or Labour Court is required to act judiciously.

In that way, the arbitrator or Labour Court is bound to consider a whole range of factors as to the quality and nature of termination and ultimately decide whether compensation is to be awarded and for what duration.

It should be noted that procedural unfairness is not insignifact and equally invites compensation. However, in assessing compensation, the nature and deviation from procedural requirements is important to consider. The overriding factor to think about is that such compensation must be just and equitable.

This is a second appeal. According to section 57 of the Labour Institutions Act, No. 7 of 2004 an appeal to this Court for matters arising from the Labour Court is limited to point of law only. It is also trite law that this Court does not interfere with quantum of compensation simply because in its opinion the compensation awarded is excessive, it only barges into when the lower court has not exercised its discretion judiciously, or if there is evidence that the amount awarded has been assessed on wrong grounds or are unreasonable.

In the present case, the High Court awarded the respondent twenty four (24) months' remuneration as compensation for unfair termination.

Given that termination has been found to be substantively fair, it is plausible that the award of compensation should not remain the same.

It is not inconsiderable to state that the only unfairness suffered by Iddi Halfani was procedural. In **RELTON FRED BOOYSEN v THE SOL PLAATJE MUNICIPALITY,** Case No. c103/16 (unreported) at para 48 the Labour Court of South Africa held that substantive unfairness in dismissal attracts greater compensation than would be the case in respect of a dismissal marred only by procedural unfairness.

In **H.M LIEBOWITZ (PTY) T/A THE AUTO INDUSTRIAL CENTRE GROUP OF COMPANIES v FERNANDES [2002] ZALAC 1,** it was alluded that there is a distinction between compensation payable to an employee who should not have been dismissed (substantive unfairness) and an employee who should have been dismissed but who was subjected to procedural unfairness, and a court deciding on appropriate compensation must reflect this distinction in its award.

We are of the view that, on summation of the circumstances of this case, the amount of compensation awarded by the High Court is exorbitantly high and at odds with the principles of equity and justice. In

the result, we reduce the award of compensation to an equivalent of twelve months' remuneration.

Associated with this is the award of costs. On this subject, we accept Mr. Mseke's submissions that there was no ground to justify the learned judge's findings that the application for revision was frivolous and or vexatious. Even so, we differ with the learned counsel's assertion that Rule 31(2) of the Labour Institutions (Mediation and Arbitration Guidelines) G.N No. 67 of 2007 was applicable in the award of costs by the High Court.

In our respectful view, the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 aim to guide Mediators and Arbitrators appointed by the Commission for Mediation and Arbitration in the exercise of their powers and functions. The award of costs by the High Court Judge in the application for revision falls under the Labour Court Rules, G.N No. 106 of 2007.

Rule 51(2) of the Labour Court Rules gives discretionary powers to a High Court Judge to award costs in a labour dispute against a party initiating proceedings if he/she finds such proceedings are frivolous and or vexatious.

The phrase *"frivolous and vexatious"* mean obviously unsustainable or wrong. In **N.D.C v G.C (2022) ZAGPHC 125**, the High Court of South Africa at Gauteng Division held that in order to prove vexatious litigation, a party must demonstrate that the respondent has persistently instituted legal proceedings and that such proceedings have been without reasonable ground.

In **CHRISTENSEN NO v RICHTER 2017 JDR 1637 (GP)** at Para. 14 – 17, in deciding whether to declare the first respondent a vexatious litigant, the South African

Court held that:

> *"The applicant is, in my view, a vexatious litigant. He should therefore be prevented from instituting any further legal proceedings against the estate and/or its executors. I am satisfied under the circumstances that the applicants have made out a case for a final interdict. They have established a clear right for the granting of a final interdict. It is clear that the applications launched by the first respondent are vague and not substantiated and*

*the balance of convenience favours the granting of the final interdict. The first respondent cannot continue to litigate as relentlessly as he does, disregarding court orders. This has to stop. I am inclined to accept that the applicants have no alternative remedy to stop him from continuing with his actions."*

In the present case, the original claim was instituted at the Commission for Mediation and Arbitration by the respondent, Iddi Halfani whereby the appellant was the respondent. Upon delivery of the award, the bank was entitled to challenge the verdict by way of revision and or appeal in accordance to Rules 26, 27, 28 or 29 and 30 of the Labour Court Rules. In challenging the CMA's decision by way of revision, the appellant did not in any manner, launch vague and or unsubstantiated proceedings to qualify as vexatious or frivolous matter as concluded by the High Court. We therefore find merit to this ground and proceed to set aside the order for costs.

In the result, the appeal partly succeeds to the extent herein stated.

It is so ordered.

**DATED** at **DAR ES SALAAM** this 10th day of August 2023.

G. A. M NDIKA

**JUSTICE OF APPEAL**

B. M. A. SEHEL

**JUSTICE OF APPEAL**

A. S. KHAMIS

**JUSTICE OF APPEAL**

The Judgment delivered this 11th day of August, 2023 in the presence of Shepo Magurari, learned counsel for the Appellant and Mr. Mngumi Samadani, learned counsel for the Respondent, is hereby certified as a true copy of the original.

S. P. MWAISEJE

**DEPUTY REGISTRAR**

**COURT OF APPEAL**