IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., FIKIRINI J.A., And, MLACHA, J.A.)

CIVIL APPEAL NO. 401 OF 2021

BENJAMINI MAZIGO .....1ST APPELLANT

AARON AMOS MPALI (As the administrator

Of the estate of Amos William Mpali) ..... 2ND APPELLANT

VERSUS

TANZANIA INVESTMENT BANK ..... RESPONDENT

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

(Muruke, J.)

dated the 27th day of August, 2021

in

Revision No. 348 of 2020

.....

JUDGMENT OF THE COURT

21st October & 21st November, 2024

LILA, JA:

The decision of the High Court, Labour Division (the High Court) is being challenged for quashing the decision and award by the Commission for Mediation and Arbitration (the CMA) in Labour Dispute No. CMA/DSM/R. 780/2016 (the dispute). While the CMA had made a finding that termination from employment of both appellants was substantially and procedurally unfair, the High Court reversed the findings and held it otherwise ending up with quashing and setting aside the CMA award.

These background facts unfold the essence of this appeal. Benjamin Mazigo (the 1st appellant) and Amos Mpali, now deceased and now being represented by Aaron Amos Mpali, a legal representative (the 2nd appellant) worked with the respondent and held various positions before their services were terminated. The 1st appellant was employed on 1/4/2010 and at the time of termination on 12/8/202016 he was a Service Manager and the 2nd appellant was employed on 21/12/2009 and at the time of termination, held the position of Principal Officer in Project Finance (Syndicate Projects). Termination of their services with the respondent is, according to their respective letters of termination, caused by improper appraising of Techpack (T) Limited application for credit dated 8/7/2016 which amounted to gross negligence.

Common to both sides is the fact that before termination, each of the appellants was served with a letter dated 8/7/2016. According to the respondent, the letter constituted a formal charge on the appellants. The appellants viewed the letters as seeking explanation on issues raised therein to which they responded through their respective letters dated 13/7/2016. Disciplinary actions took course starting with the 1st appellant who was summoned to appear before the Disciplinary Committee on 5/8/2016 followed by that of Amos

Mpali on 4/8/2016. The hearing proceeded and resulted in the appellants being found guilty and later being issued with termination letters as earlier indicated. They challenged the termination before the CMA which held in their favour holding that termination was both substantively and procedurally unfair but, on revision to the High Court by the respondent, the CMA's award was overturned, quashed and set aside. In compliance with the provisions of section 57 of the Labour Institutions Act, Act No. 7 of 2004 (the LIA) which require appeals to the Court be grounded on issues of law only, the appellants are now challenging the High Court decision on these grounds: -

"1. The revisional Judge erred in law in holding that termination was procedurally fair as;

a) The appellants were not formally charged and were not charged for negligence

b) The respondent did not present any evidence or call witness before the disciplinary committee to prove her case.

c) The Secretary of the disciplinary committee was involved in the issue that caused the disciplinary hearing to be conducted.

d) The appellants were denied their right to appeal within the Bank.

2. *The revisional Judge erred in law and facts in holding that the termination was substantively fair despite the fact that the*

employer did not comply with the Code of Good Practice G.N. No. 42 of 2007.

Learned counsel Mr. Evans Nzowa appeared before the Court to represent both appellants and Mr. Francis Rogers, learned Principal State Attorney, appeared for the respondent. Both counsel prefaced their submission by first adopting the written submissions they had earlier lodged in Court in compliance with Rules 106(1) and 106(8), respectively. We commend them for the elaborate submissions, but we shall refer to them in the course of the judgment depending on their relevance.

Further to the above, upon our serious examination of the record of appeal, written submissions by the parties and the parties' respective learned counsel oral arguments before us, we have formed a view that, we should deliberate on the complaint in ground 1(a) first as it will shade light on the deliberation in respect of the second ground of appeal. Being so inclined, we shall only confine ourselves on the laws applicable and we shall make reference to the parties' arguments in that respect.

The complaint in ground one is a serious one. It assails the High Court for not addressing itself on whether there was a formal charge against the appellants when they appeared before the Disciplinary Committee, a

defect considered by the appellants to be fatal. Hotly contested here are one, existence of formal charge and two, non-production of evidence by the respondent to prove the charge at the disciplinary meeting.

In both the written submissions and oral arguments before us, Mr. Nzowa maintained his stance that the letters titled TECHPACK (T) LIMITED FACILITIES REVIEW served on the appellants dated 8/7/2016 required them to account for discounting by 20%, 10% and 20% the machineries which explanations they rendered in their letters dated 13/7/2016 titled TECHPACK (T) LIMITED – FACILITIES REVIEW. According to him the letters dated 8/7/2016 did not measure up to the requirements of Rule 13(2) of the Employment and Labour Relations (Code of Good Practice) Rules, G. N. No. 42 of 2007 (the CGP) read together with paragraph 4(3) of the Schedule to the Code of Good Practice, Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures. He relied on the Court's decision in **Jimson Security Service vs Joseph Mdegela**, Civil appeal No. 152 of 2019 (unreported). He drew the Court's attention to the letters of termination which indicated that the appellants were terminated on grounds of gross negligence, conducting themselves unprofessionally and jeopardizing the Banks interests which were neither a subject in the letters dated 8/7/2016 nor

charged before the Disciplinary Committee. In all, he concluded that the procedure for conducting a disciplinary hearing was flawed hence the appellants were not charged or heard on the grounds of termination. His prayer was therefore that the High Court decision be quashed and the CMA award be upheld.

Mr. Roger's position, at the inception, was to resist the appeal and he adopted the reply submissions earlier lodged by the respondent and sought for the appeal to be dismissed. But, when we allowed him time to reappraise himself of the express requirements of section 13(2) of the Code of Good Practice (the CGP) as compared to the contents of the letters to the appellants dated 8/7/2016, he conceded to the absence of a formal charge against the appellants. He readily admitted that the letters had no bearing with a legally anticipated charge. Having taken that course, he agreed with Mr. Nzowa that the learned revisional Judge was in error to hold, as he did, that termination was procedurally fair.

Indeed, it is our firm view that even without Mr. Roger's concession, the reality would still stand that the appellants appeared before the Disciplinary Committee without there being a formal charge. Rule 13(2) of the CGP is clear that where an investigation of a misconduct complained of by the employer reveals that there are grounds to hold a disciplinary

hearing, a formal charge must be framed and served on the employee in a language understandable by him and should be given not less than forty-eight (48) hours to appear before a disciplinary committee. It provides: -

> *"13.-(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.*
>
> *(2)* ***Where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand."***
> (emphasis added)

Summarizing on the general import of Rule 13 of the CGP, Bonaventure Rutinwa, Evance Kalula and Tulia Ackson in the book **THE NEW EMPLOYMENT AND LABOUR RELATIONS LAW IN TANZANIA: AN ANALYSIS OF LABOUR LEGISLATION IN TANZANIA**, at page 126 have this to say: -

> *"**Rule 13 of the Code of Good Practice Rules, 2007 sets out the requirements of procedural fairness**. They include, inter alia, an investigation to ascertain whether there are grounds for a hearing; notification of where the hearing is to be held using language in a form that*

an employee understands; allowing an employee reasonable time to prepare; holding and finalizing the hearing within reasonable time.

Rule 13, in so far as procedural fairness in cases of misconduct is concerned, seems to raise the following issues among others: ***firstly, carrying out thorough investigation to ascertain if there are good grounds to conduct a hearing.*** *Where there are serious allegations of misconduct the employer may resort to the provisions of Rule 27(1) which empowers the employer to suspend an employee on full remuneration whilst the allegations are investigated and pending further action.* ***Secondly, notification to the employee of the allegations or charges against him or her should be done using a prescribed form which the employer may prescribe.*** *There is an advantage in using a prescribed form instead of drawing charges on a company letterhead whenever the need to do so arises. ...****Thirdly, the charges against the employee should be drafted in precise and simple language and should clearly show that the consequences of a finding of guilty could lead to termination of employment. In this respect, it is preferable to cite the relevant***

> ***provisions of the disciplinary code, a collective agreement or the applicable law, as the case may be, that the employee is alleged to have infringed.*** *Fourthly, the right to representation by a trade union or fellow employee must be secured...".* (Emphasis added)

A charge being the foundation of allegations or accusations an employee is to face at the disciplinary hearing, must be let to be known to the employee well in advance. The employee should know the nature of the accusations and, unless this is done, a fair hearing at the disciplinary meeting cannot be achieved. We therefore entirely agree with them and endorse the above excerpt as presenting a proper import of Rule 13 of the CGP.

Gauging the letters served on the appellants dated 8/7/2016 against the requirements set out above, it is obvious that they bear no resemblance of a charge anticipated under Rule 13(2) of the CGP. The letters, as correctly argued by Mr. Nzowa, required the appellants to avail to the respondent an account as to why they discounted the machineries in the percentages stated above which explanations they offered in their respective letters dated 13/7/2016. Fortunately, even Mr. Rogers later conceded to this fact that there was no formal charge making it not

difficult for the Court to allow this ground of complaint and we accordingly hold that the learned revisional Judge strayed into error to hold that termination of the appellants was procedurally fair. This would suffice to determine the complaint but, let us say something which is linked to it which is the process of hearing the parties at the disciplinary committee.

The complaint here as expressed in ground 1(b)is failure by the respondent to call witnesses. The disciplinary hearing forms found at pages 64 to 66 of the record of appeal for the 1st appellant and pages 67 to 69 of the record of appeal for the 2nd appellant, speak loudly that the appellants appeared and their respective responses to the questions put to them were recorded. It is not shown who asked those questions and there is no indication that the appellants were accorded the right to call witnesses. It cannot, therefore be said that they presented their respective testimonies as required by law. The more so and seriously, it is vivid that the employer (respondent) produced no witness(es) to prove the allegations thereby denying the appellants their fundamental rights to cross examine them had they appeared in contravention of the requirements of Rule 13(5) of the CGP which provides: -

> *"(5) evidence in support of the allegations against the employee shall be presented at the hearing. The employee shall be given a proper opportunity*

at the hearing to respond to the allegations, question any witness called by the employer and to call witnesses if necessary."

It is now general knowledge that the burden of proof lies on the person who alleges existence of a certain fact, a position we pronounced in **Paulina Samson Ndawavya v. Theresia Thomasi Madaha,** Civil Appeal No. 45 of 2017 (unreported), that:

> ***"...the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason. Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party...*** "[Emphasis added].

Without any exception, the same test or standard of proof, applies in labour matters they being of a civil nature, as we made it clear in Civil

In the circumstances, we are satisfied that there were no formal charges levelled against the appellants and the meeting did not qualify to be a formal disciplinary meeting. In any case, it was a one sided case in which only the appellants were crucified without the accusations being made clear to them by the respondent who initiated the disciplinary meeting. To add up, the allegations stated in the termination letters were not proved by evidence. Legally, the allegations ought to have been formulated in a charge and the respondent ought to have led evidence to substantiate them. Under such circumstances, we are unable to see how the appellants were found guilty of a substantive allegation of gross negligence. This finding answers not only ground 1(b) but also ground 2 of appeal that the appellants' complaints that the accusations were not proved by the respondent by calling witnesses. The absence of a formal charge containing the allegations of misconduct and evidence proving them by the employer (respondent), rendered the termination unjustified hence unfair substantively and procedurally. We allow the two grounds of appeal.

In the final analysis, it is our finding that there was no justification for the learned Judge to overturn the CMA's finding that the appellants' termination of employment was both substantively and procedurally unfair. We accordingly quash and set aside the High Court decision and sustain the CMA's award in that respect as prayed.

We cannot just stop there. A finding that termination was not fair substantively and procedurally without pronouncing the respondents' entitlements (reliefs) they deserve is not by itself sufficient to dispose of the matter.

In its award, the CMA considered the possibility of future employment and the quantum of terminal benefits as determined at pages 285 and 286 of the record of appeal. Having noted that, we engaged the learned counsel of the parties to address us on two issues we found crucial in the determination of the deserving reliefs. Mr. Nzowa was quick to remind the Court that the appellants, in Form No. 1 which referred the dispute to the CMA, had prayed for reinstatement not those reliefs granted by the CMA which he urged to be rectified and proper reliefs be granted by the Court. Mr. Rogers fully agreed with him. As regards impossibility of being employed again, both were also in agreement that no proof was

produced by the appellants hence could not be the basis of determining the amount of compensation.

Despite acknowledging that the appellants had prayed to be reinstated, in its award, the CMA turned down the prayer and ordered that they each be paid compensation equal to twenty four months salary amounting to TZS 194,400,000.00 for the1st appellant and TZS 242,880,000.00 for the 2nd appellant stating, as reasons, that; **one** they have been out of work for a long time hence their positions must have been filled, **two**; *AMOS MPILI* (the 2nd appellant) passed away and **three**; Benjamin Mazigo (1st appellant) is over 50 years of age and has been out of work for three years and the work relationship is not good. To quote, the CMA used these words: -

> *"Kwa kuwa wao waliomba kurudishwa kazini/ reinstatement, Tume imekataa ombi hilo kwa sababu zifuatazo;*
>
> *Moja, walikuwa nje ya kazi kwa muda mrefu, hivyo ni wazi kuwa nafasi zao kwa namna ya umuhimu wake kwa mwajiri ni wazi kuwa zitakuwa zimejazwa na watu wengine, pili, kwa mfano mmoja wao Bw AMOS MPILI yeye ameshafariki hivyo haiwezekani kurudishwa kazini, tatu MAZIGO yupo zaidi ya miaka hamsini na amekuwa*

nje ya kazi kwa Zaidi ya miaka mitatu hivyo kumrudisha kazini ni kumpatia mwajiri kazi mpya ya kumwandaa kisaikolojla na kumfunza kazi upya hasa kwa mbinu mpya na changamoto mpya atazozikuta kazini, lakini kubwa Zaidi ni kwamba uhusiano wao wa kiajira ni wazi umeharibika kiasi cha cha kutoweza kuaminiana tena, kwa mujibu wa tuhuma walizotuhumiana.

Hivyo baada ya kuzingatia hayo, Tume imeona kuwa ni sahihi kuamuru walalamikaji wote walipwe compensation/fidia ya kuachishwa kazi isivyo halali ambayo imetolewa na kuamriwa na Tume dhidi ya mlalamikiwa kwa kuzingatia vigezo vifuatavyo.

Hukumu za Mahakama Kuu kama zilivyonukuliwa hapo juu, umri wa walalamikaji kuwa ni wazee sana na hawataweza kuajirika upya popote pale, huku wakiwa ni watu wa familia mbaya Zaldi mmoja amekwisha tangulia mbele za haki, mazingira waliopata kuachishwa kazi kwamba walionewa wao peke yao paslpo kuelezwa kwanini wao tu ndio walichaguliwa kuachishwa kazi katika suala la mchakato lililohusishwa vitengo sita na wataalamu tofauti tofauit.

Kwa kuzingatia hayo sasa naamuru mlalamikiwa kuwaiipa walalamikaji wote wawili mishahara ya

miezi ishirini na nne kwa kila mmoja wao kwa mchanganuo ufuatao;

1. *BENJAMIN MAZIGO 8,100,000 X 24= 194,400,000/=*
2. *AMOSI MPILI [MAREHEMU] 10,120,000 X 24 =242,880,000/=*

Jumla ya malipo yote ni shilingi 437,280,000/= tu. Uamuzi huu utekelezwe ndani ya siku arobaini na mbili tangu siku ya kwanza mwajiri kupookea uamuzi huu..."

The questions that have exercised our minds considerably are, whether it was proper for the CMA to depart from the appellants' prayer for reinstatement, whether the basis of the award discussed above came from the appellants or whether the parties were heard on them and finally, whether it was upon the CMA to come up with quantum of compensation for each appellant.

Fortunately, the parties' counsel are on the same footing that the considerations founding the CMA's award were not a subject of the dispute and the appellants were not heard on them but was the CMA's own formulations. Worse still, the CMA acted in violation of the settled principle that parties are bound by their own pleadings and courts will only grant reliefs to that extent pleaded (see **Makori Wassaga v. Joshua**

Mwaikambo & Another [1987] T.L.R 88) and, like other courts, the CMA is precluded from awarding what was not pleaded (See **David Sironga vs Francis Arap Muge & 2 Others** [2014] Eklr, cited in Civil Appeal No. 365 OF 2019 between **Maria Amandus Kavishe and Norah Waziri Mzeru** (Administratrix of the Estate of the late Silvanus Mzeru and Another). So, we unhesitatingly hold that the CMA's refusal to order reinstatement and granting prayers not sought or pleaded by the appellants was an error.

In all fairness, the provisions of section 40(1) (2) and (3) of the ELRA are clear that where termination of employment is found to be unfair, the remedy available to the employee is either reinstatement from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or re-engagement on any terms that the arbitrator or Court may decide or to pay compensation to the employee of not less than twelve months remuneration. The law also treats payment of compensation not as a stand-alone benefit, but as a payment in addition to other rights under the law or contract.

In the circumstances of the present case that the appellants were unfairly terminated from employment and they preferred reinstatement, the appellants deserve an order of reinstatement without loss of

remuneration in terms of section 40(1)(a) of the ELRA. That said, we hold that the CMA strayed into error to order payment of compensation alone.

We shall secondly clarify on the CMA's and court's legal duty in employment cases. Under the law, the CMA and the court's duty is to pronounce/declare the parties' statutory rights under the law. Proceeding further to determine the actual amounts (figures) to be paid to the unfairly terminated employee may result into a mathematical error. We wish to state and emphasize at this juncture that determination of the quantum of benefits (figures) payable to an unfairly terminated employee is a matter governed by law and this task is, in our firm view, a matter to be determined during execution of the CMA or court's order by the employer or by the executing court where assistance of the court is required. It should be, however, noted that where the CMA or court orders reinstatement, the employer (respondent) is not required to directly pay an employee his terminal benefits for he has an option to choose. The option available to the employer (respondent) under section 40(3) of the ELRA is either to receive the employee back to work or not. The section provides: -

> *"(3) Where an order of reinstatement or reengagement is made by an arbitrator or*

Court and the employer decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment."

Ipso facto, after a finding that termination was unfair, the CMA ought to have had ordered the appellants to be either restated, re-engaged or paid compensation. It then remains to be the duty of the respondent, at the time of execution of the award, to invoke the provisions of section 40(3) of the ELRA and exercise the options available either receive them back to work or not. Where the respondent would have opted for not accepting back the appellants, then she would be required to pay to each appellant compensation amounting to twelve months salary in addition to his other rights payable where there is unfair termination. It should be noted, however, that payment of compensation in lieu of reinstatement would, in terms of Rule 32(2)(a), (b) and ((c) of the Labour institutions (Mediation and arbitrations guidelines) GN No. 67 of 2007 where, among other reasons, it is proved by evidence, respectively, that the employee did not wish to be reinstated in the form initiating the labour dispute before the CMA (CMAF1) but prayed to be paid compensation,

where work relationship had turned sour (irreparably broken down) or it is reasonably not practical to reinstate the employee. As demonstrated above, no such evidence was forthcoming from the parties, hence the CMA ought to have considered the appellants' prayer for reinstatement they had pleaded. Of important, in our case where the appellants had pleaded to be reinstated in their respective CMAF1s, where the respondent would not have preferred to reinstate the appellants, it would be required to pay each appellant the statutory twelve months salary in terms of section 40(3) of ELRA as compensation and other rights as provided in terms of section 44 (1) of the ELRA. That section provides: -

> *"**44**.-(1) On termination of employment, an employer shall pay an employee -*
> *(a) any remuneration for work done before the termination;*
> *(b) any annual leave pay due to an employee under section 31 for leave that the employee has not taken;*
> *(c) any annual leave pay accrued during any incomplete leave cycle determined in accordance with section 31(1);*
> *(d) any notice pay due under section 41(5); and*

(e) any severance pay due under section 42;

(f) any transport allowance that may be due under section 43.

Before we conclude, we find it prudent, to avoid doubts, pronounce the appellants' entitlements. We start with the 2nd appellant. There is a fact borne out by the record and not controverted by the parties at the hearing of the appeal, that the 2nd appellant passed away. His entitlements pose no difficulty at all. As he deserved a reinstatement order without loss of remuneration, and as an order of reinstatement is impracticable, his order of reinstatement shall start from the date of unfair termination (12/8/2016) and shall be entitled to payment of remuneration from that date to the date of death or retirement, whichever occurred first and other rights as provided under section 44(1)(b)(c)(e) and transport for his family to his reicruitment (section 44(1)(f)). As for the 1st appellant, reinstatement and payment of remuneration shall be for the whole period since the date he was unfairly terminated (on 12/8/2016) to the date of reinstatement if retirement period is yet and is received back to work. If not received back at work and retirement period is not yet, he shall be entitled to

payment of the statutory twelve months salary compensation and other rights as per section 44(1) of the ELRA as alluded above.

In fine, the appeal is allowed to the above extent. The CMA award is modified accordingly.

DATED in **DAR ES SALAAM** this 20th day of November, 2024.

S. A. LILA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

Judgment delivered this 21st day of November, 2024 in the presence of Mr. Emmanuel Ndaga holding brief for Mr. Evans Nzowa, learned counsel for the Appellants and Messrs. Frida Mollel and Lilian Milumbe, learned State Attorneys for the Respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL