

TANZANIA / JUDGMENT

REV NO 1485 OF 2024 EQUITY BANK TANZANIA LTD VRS ANTIGON FRATERN MROSSO

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LABOUR DIVISION AT DAR ES
SALAAM REVISION APPLICATION NO. 14385 OF 2024 CASE REFERENCE NO.

202406191000014385 BETWEEN EQUITY BANK TANZANIA L T D

APPLICANT VERSUS ANTIGON FRATERN M R O SSO RESPONDENT

JUDGEMENT

Date of last Order: 17/ 07/2024 Date of Judgement: 01/ 08/2024 MLYAMBINA, J. In this revision, the Applicant is challenging the Award of the Commission for Mediation and Arbitration (herein CMA) with reference No. CMA/DSM/IIA/492/19/227 issued by Hon. Msina, 20th May, 2024 on the following issues:

- i. Whether it was proper for the trial Arbitrator to declare unfair termination even after the solid evidence from the employer which proved on balance of probabilities that the Respondent engaged himself into the private and competing business contrary to the Human resource manual. ii. Whether the Trial Arbitrator did properly evaluate the evidence presented before her in deciding the matter in favour of the Respondent iii. Given the facts and circumstances of the case whether it was fair for the Trial Arbitrator to order reinstatement of the Respondent Employee. The application proceeded orally. Arguing for the application, the Applicant was represented by Counsel Frank Kilian. On the other hand, the Respondent engaged the services of Counsel Charles Mathias. The first and the second grounds were jointly argued. It was Counsel Kilian's submission that it was not disputed by the Respondent that he had registered his private company known as AFIC Consulting Company Ltd of which he owned 80% shares and her wife Jacqueline Sylvester Mahinga owned 20% shares. The said search from BRELA was admitted as exhibit D4. Clause 18(23) of the Human Resource Policy Manual, makes it clear that: No employee shall engage himself in a private business while working with the Bank. Contrary to the quoted clause, the Respondent registered his company in the year 2014 and up to the year 2018 when the dispute arose, he never declared that he owned a company. Counsel Kilian was of the following submission points: First, it is restricted by the company to have a private business

while working with the Bank. Second, if one owns the company must declare as soon as possible. Third, the said company was discovered to have been involved into conflict of interest with the affairs of the employer. Around November 2018, the Bank received an email from the anonymous person who accused the Respondent to have a tendency of instructing Bank Client to take their financial audit report to his firm known as AFIC Investment and Consultancy Limited. That, the unanimous person alleged the Respondent received bribe to the tune of TZS 6 million. Those allegations are found in the investigation report. The email from the unanimous was received as exhibit D2. He went on to submit that; after the whistle-blower from unanimous person, DW2 was appointed to conduct an investigation. After investigation, it was discovered that the Respondent owns a company and when he was attending a client known as ICK Cotton based in Mwanza. He rejected his loan application and referred DW2 (Mr. Emmanuel Makul

- a) to a person known as Fridolin Kyauke as a competent person who can assist in preparing the financial statement that was alleged missing. DW2 discovered that the said Fridolin Kyauke has posted himself into a LinkedIn that he is an employee of AFIC Investment and Consult Ltd. It is the said Fridolin who was paid by DW2 to carry on the financial statement alleged missing. The Counsel was of the strong view that the Arbitrator disregarded the solid evidence available in record. It was further submitted by Counsel Killian that the Respondent was charged with five charges and most of them are for conflict of interest. That, looking into count number 3, the Respondent failed to prioritize the interest of customer and treat the customer with dignity. He was of the view that the count was proved because the ICK company is based in Mwanza but the financial statements were prepared in Dar es Salaam. So, the customer was incurring more expenses to engage a law firm based in Dar es Salaam while other similar activities of his client were done in Mwanza. In response, Counsel Mathias strongly opposed the application and stated that the evidence clearly suggests the Applicant had no reason to terminate the Respondent. He said, the anonymous report did not specify which firm the Respondent had an interest in. He added that; there was no evidence to prove that the Respondent used undue influence to convince or compel the Applicant's client called ICK Cotton mills Company to use the Respondent's private firm called AFIC investment and Consulting Company Ltd for preparation of the financial and management account that were required by the Applicant's Bank to appraise the loan application. Further, Counsel Mathias submitted that the financial and management account which is the gist of this complain alleged to have been prepared by the said AFIC were never tendered during disciplinary hearing neither arbitration hearing to prove that AFIC prepared such financial and management account. Again, the investigation report (exhibit D3) on page 2 first paragraph showed that an auditing firm called HH martin conducted the financial for ICK cotton mills and not AFIC investment and Consulting Ltd. Coming to none disclosure of the business, Counsel Mathias argued that under clause 18 (23) of exhibit D1 which is the HR Manual Policy, it is on record from the evidence of PW1 that it was supposed to be read together with Clause 18.9 which does not provide for a specific time to disclose. However, it provides for the Award at the earliest opportunity. Therefore, the Respondent

did not disclose the same because his company did not come into operation. Pursuant to the provision of Section 37 of the Employment and Labour Relations Act [Cap 366 RE 2019] (herein ELRA), the employer is required to terminate the employee on valid reason and after following the stipulated procedures. This is also the Court's position in the case of Joseph Fissoo and 58 Others v. Ithna Asheri Charitable Hospital, Civil Appeal No. 514 of 2020, Court of Appeal of Tanzania at Arusha, pp 17 and 18 cited by Counsel Mathias. He was of submission that the cited provision above underscores the need of the employer to ensure that for any termination of employment to qualify unfairness three criteria must co-exist; first, the reason is valid. Second, the reason is fair and; third, that the employment was terminated in accordance with fair procedure. In the application at hand, the termination letter (exhibit AP2) indicates that the Respondent was terminated for gross misconduct that he contravened the Human Resource Policy and terms of the appointment as follows: Exploiting his official position for personal gain which is conflict of interest and gross misconduct. That he used undue influence to compel a client ICK COTTIN MILL CO. LTD from Mwanza to use his own firm AFIC & CONSULTING in Dar es Salaam in the preparation of financial and management accounts that were required by the Bank in order to appraise his loan application. This is contravention of the Bank's Human Resource Policy under Code of Conduct and Work Ethics. Failing to declare interest when appraising loan facility of ICK Cotton Mill Company which is a conflict of interest and a gross misconduct: That he involved himself in the appraisal of the loan application of ICK Cotton Mill and without declaring his interest that his firm/employees had been involved in the preparation of financial and management accounts of the said customer. Failure to put the interests of the customer first and to treat customer with dignity which is a contravention of the core values and gross misconduct. Non-Declaration of his business-AFIC INVESTMENT & CONSULTING which is a contravention of the Human Resources Policy - a gross misconduct. Exposing the Bank to risk of reputation loss/harming the Bank's reputation by putting his own interest first and not showing consideration to the interest of the customer or the Bank, that he put the Bank at risk of reputation loss. Which is a breach of the Human Resources policy and the terms of his appointment. The record shows that the disciplinary hearing Committee found the Respondent guilty with two misconducts. The second and the third one. This is evidenced in the disciplinary hearing minutes (exhibit D II). On such basis, the Applicant was only supposed to terminate the Respondent on the proved misconduct. Nonetheless, it is my view that the termination was substantively fair because of the following reasons. The Respondent being the Applicant's employee, was aware of the rules and policy governing the office. As per Clause 18.23 of the Human Resource Policy Manual, employees of the Applicant are not allowed to engage themselves in any private business. The clause is to the effect that: While in employment with the bank, staff members are not allowed to engage in private business In his own testimony before the disciplinary committee, the Respondent admitted that he was aware of the policy and that in case an employee has any business he/she has to disclose such business. For easy of reference, I hereunder quote part of the Respondent's testimony: Erick: For how long have you been in the bank? Antigone: 7 years. Erick: Did you read the HR Policy and you know that you are supposed to declare? Antigone: I

read and I know. From the above testimony, it is clear that the Respondent was aware of the policy but he proceeded to violate the same. I have noted the Respondent's argument that there is no time frame for the employee to declare his/her business as per clause 18.9 of HR Policy. It is my view that the declaration should be made as soon as possible after the business or interest has been established. In the case at hand, it is undisputed that the Respondent started his business on 18th September, 2014 as evidenced by exhibit D4. The business came to the Applicant's knowledge after his own investigation following the accusations tabled against the Respondent. On that basis, it is my view that the Respondent breached the rules. Again, the Respondent in his own free will admitted that he knew the person known as Kyauke who was involved in loan facility of ICK Cotton Mill Company. I hereunder quote his testimony for easy of reference: George: Antigone, do you know Fridolin Kyauke? Antigone: I know him but he is not employee to my company AFIC Investment and my company is not an auditing firm, so legally, we don't have the right to do financials and it is owned by me and my wife and no one has skills on doing financials. I can analyse financials but I cannot prepare financials. Leynette: How do you know Fridolin Kyauke and referred him to Emmanuel (Credit Manager Mwanza Branch) Antigone: I know his brother who is a prominent lawyer in the town and I know Fridolin Kyauke coz know his brother and they are from the same father but I never referred him to Emmanuel. Looking at the evidence, DW2 testified that the said Fridolin Kyauke was introduced to him by the Respondent. Again, as per the official search, Fridolin Kyauke was found to be the employee of the Respondent. Thus, the evidence available linked the Respondent with the loan facility of ICK Cotton Mill Company. Therefore, the Applicant proved the misconduct charged on the balance of probability. As regards to the procedural unfairness, Counsel Killian submitted that the Respondent was served with the investigation report and during the disciplinary hearing, he was referring the investigation report, but the trial Arbitrator ruled out that the procedure was not followed. The Respondent was not served with the investigation report. He stated that; if one makes follow up of the material facts of the case, will find out that the procedure for terminating the Respondent was of two parts. The first part started from November, 2018 up to 5 April, 2019 when the Respondent was served with the letter for annulment of disciplinary proceedings after the employer noted that the Respondent was not served with the investigation report. After the annulment the disciplinary committee proceeded after the Respondent was served with the investigation report. The said letter for annulment was received as exhibit AP8 dated 5th April, 2024. Thereafter, all other proceedings of disciplinary hearing did take place. Counsel Kilian submitted that the Respondent did acknowledge during disciplinary hearing that he saw an investigation report. That is the proof of being served. The purpose of annulling the disciplinary hearing process was to serve the Respondent with the investigation report. He could not have proceeded with hearing, if he was not served. He added that; looking to the letter from the Respondent as a response to the show cause letter, the Respondent was referring to the investigation report while making a reply. This is the proof that he was served. In reply, Counsel Mathias maintained that the Respondent was not served with the investigation report. He stated that; after the annulment of the first disciplinary hearing, the

Respondent was called again to attend another disciplinary hearing via exhibit AP9. Surprisingly, no charges were given. The annulment letter and invitation letter (the summons) contained five charges which were supposed to respond during hearing but not give a chance to prepare his defence as promised. He strongly submitted that the investigation report was given during disciplinary hearing. It was further submitted in reply that looking at the outcome of the disciplinary hearing held on 16/05/2019, were given to the Respondent li and signed on 27/05/2019 in exclusion of weekends, 8 days had elapsed contrary to Guideline 4 (9) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures of the Employment and labour Relations (Code of Good Practice) Rules GN No. 42 of 2007 which provides for five working days. It was added that; with the recommendation of the committee under the same exhibit D12, the Respondent was found guilty of two counts. However, looking on exhibit D13 which is termination letter, the Respondent was terminated on five charges against the committee recommendation. Also, DW3 under first paragraph page 25 of the Award admitted to such count that the findings of the committee were different from that of the disciplinary committee. The termination procedures on ground of misconduct are provided under Rule 13 of GN. No. 42 of 2007. I find no relevance to reproduce and discuss all the stipulated procedures. The Respondent alleged that he was not served with the investigation report. As per the notice to attend disciplinary hearing (exhibit AP9), it is clearly indicated that the report was handed over to the Respondent together with the relevant notice. Therefore, the allegation that he was not served with the investigation report is of no value. The Respondent further alleged that he was not served with charges. Reading exhibit AP9, I find the charges were listed therein and their particulars. As such, the allegation can not detain the Court much. The last alleged violated procedure is the fact that the Respondent was served with the disciplinary outcome more than five working days contrary to Guideline 4 (9) (supra). The Applicant did not dispute such fact. The disciplinary meeting was held on 22/05/2019 and the result were served to the Respondent on 29/05/2019 after lapse of five working days without any justification on record. Therefore, the pointed procedure was violated. Coming to the last ground, Counsel Killian submitted that this matter has been pending in Court since 2019 which make a total of five years and the position that was held by the Respondent must have been replaced by someone. He argued that by ordering reinstatement, it created more conflict at the working place because the employer has to terminate the person who holds that position and reinstate the Respondent into that position. It is not the spirit of the CMA to create conflict rather than solving it. It was added that this matter was pending in the Court not at the instance of the parties but the CMA itself had some factors which contributed to the prolonged hearing of the case. Counsel Killian notified the Court that in the year 2021 through Revision no. 185 of 2021/this Court presided by Hon. Judge Mganga noted some irregularities on the part of the CMA as some of the witnesses were not sworn. The High Court ended up nullifying all CMA proceedings and its Award and remitted back the file to the CMA for trial denovo. It was Counsel Kilian's view that the period which the CMA made some error could have been considered by the trial Arbitrator and order another remedy if the employer was proved to have failed in his case. In response, Counsel Mathias

supported the Arbitrator's findings. He submitted that since the Applicant failed to prove that the termination was fair both substantively and procedurally, then the order of reinstatement was rightly made as prayed in the CMA FI and pursuant to Section 40 of the ELRA (supra). It was further submitted that if the Applicant does not wish to reinstate the Respondent, he has an option of paying him in terms of Section 40(3) of ELRA (supra). Thus, the Arbitrator's decision must be complied with. In support of the submission, he referred the Court to the case of Standard Chartered Bank Tanzania Ltd v. Linas Simon, Revision No. 378 of 2019 High Court Labour Division at Dar es Salaam, p. 21. As regards to the Respondent's entitlement, since it is found that the Respondent's termination was only unfair procedurally, I find the Award of reinstatement is not justifiable in this case. Consequently, the Arbitrator's Award is hereby quashed and set aside. In the result, I find the present application is meritorious. The Respondent's termination was unfair only on procedural aspect. Therefore, the CMA's award is hereby revised. The Applicant is ordered to pay the Respondent a compensation of three months amounting to TZS 11,323,620/= for the noted procedural unfairness. It is so ordered. Y. J. MLYAMBINA JUDGE 01/08/2024

Judgement pronounced and dated 1st August, 2024 at 15:29 in the presence of Counsel Frank Kilian for the Applicant and Frank Kilian holding brief of Charles Kisoka for the Respondent. Right of Appeal explained

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Prepared on 12 October 2026 · Esheria