

TANZANIA / JUDGMENT

moses christom haule vs finca microfinance bank ltd 2023 tzhc 20588 31 august 2023

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA
(LABOUR DIVISION) AT MBEYA LABOUR REVISION NO. 24 OF 2022 (Arising from Labour Dispute
No. CMA/MBY/MBY/29/2022/ARB-20) BETWEEN MOSES CHRISTOM
HAULE..... APPLICANT AND FINCA MICROFINANCE BANK
LTD..... RESPONDENT

JUDGMENT

Date of Last Order: 17/07/2023 Date of Judgement: 31/08/2023 NDUNGURU, J. The applicant, Moses Christom Haule has filed an application under section 91(l)(a), 2(a)(b) and (c), 4(a) and (b) and 94(l)(b)(i) of the Employment and Labour Relations Act, Cap. 366 R.E 2019 (ELRA) and Rule 24 (1) (2)(a),(b),(c),(d),(e) and (f), 3(a)(b)(c)(d), and 28(l)(b)(c)(d) and (e) of the Labour Court Rules GN No. 106 of 2007 for the order that this Honorable Court revise the award of the Commission for Mediation and Arbitration (CMA) delivered on the 19th of October 2022 in Labour Dispute No. QW^I MBY/MBY/29/2022/ARB-20 by Hon. Fungo E, J, the Arbitrator. i A brief background of this case is that; on 9/6/2008, the applicant was employed by the respondent as a loan officer in Dar es Salaam. He was then in 2011 promoted to credit supervisor and thereafter a branch manager in Arusha and Meru branches. In 2014, again he was promoted to the position of Zonal Manager of Arusha-Moshi-Tanga zone. It seems, in 2014 some changes occurred in the zone where some branches were closed while others were combined into single branch then the applicant returned to his position of branch manager. Then in 2019 he was transferred to Mbeya Branch in his position. In Mbeya things turned horrible to the applicant as in 2021 did not perform according to the required standard respondent. For that he was given three months Performance Improvement Plan (PIP) from October to December, 2021. Unfortunately, the applicant did not improve as the result he was terminated from employment for the reason of poor work performance. He was subsequently paid all of his dues including; one month salary in lieu of notice of termination, leave accrued but not taken, salary for worked days, severance payment, Bus fare for him and his dependants from Mbeya to Morogoro the applicant's place of recruitment, transport of personal effects and certificate of service. 2 Aggrieved by the

termination, the applicant lodged a labour dispute in the CMA claiming for unfair termination and prayed for 96 months salaries compensation. The applicant's grounds for dissatisfaction were contained under paragraph 5 (a) and (b) of his affidavit. He stated that:

- (a) The Hon. Arbitrator erred in law and facts by her failure to analyse and evaluate properly the evidence that was adduced before him, ignoring the applicant's evidence which was overwhelmingly in his favour, hence arriving at unjust decision of refusing to grant compensation as sought in CMA F.I.
- (b) That the Hon. Arbitrator grossly erred in law and facts by making a finding that the applicant's termination was both substantively and procedurally fair while the respondent failed to substantiate of the same. The applicant deposed under paragraph 6 of his affidavit that issues to be determined by this court are:
 - i) Whether the arbitrator properly analysed and evaluated the evidence on record; and 3 ii) Whether the applicant's termination was both substantially and procedurally fair. The application was heard ex-parte as the respondent entered no appearance although being duly served and appeared at the last adjournment date. The hearing has taken out by way of written submissions was Mr. Gerald Msegeya learned advocate who represented the applicant. Advocate Msegeya submitted that the CMA erred when it failed to find that the applicant's failure to meet performance standard was beyond his control since he had no support from his supervisor and the respondent's decision of stopping issuing loans beyond 40 km. He referred me to (exhibit RX1) that in that exhibit the applicant raised the concern but unheeded. Advocate Msegeya further argued that the applicant did not get any assistance from the, respondent so as to improve the situation than the PIP. According to him the respondent was required under Rule 18
- (2) of the Employment and Labour Relations (Code of Good Practice) Rules GN No. 42 of 2007 (henceforth the Code) to be give appropriate guidance, instruction or training, if necessary, to the applicant before terminating him. 4 Mr Msegeya went on submitting that had the CMA considered the fact that the respondent restricted loans to areas less than 40 km, increased interest and reduced amount of loan would have come to the conclusion that the respondent contributed to poor performance of the applicant. On that argument he relied on MIC Tanzania Ltd v. Chris Stratham [2015] LCCD 190. In that case it was observed that though the employer has managerial prerogative to set performance standard there are other factors to be considered such as emerging competition, economic power of the user of the service, human resources etc Mr. Msegeya argued. Also, that the CMA would have considered the factor of illness of the applicant would have not reached to the decision it made. According to him the fact of illness was not challenged by the respondent as he had knowledge the same as can be gained from the minutes in the performance review meeting of 10/1/2022 (exhibit P8). z As far as the procedures is concern, Mr. Msegeya argued that the respondent did not issue final warning after a three months failure to perform as per the performance improvement plan. And that the respondent was supposed to conduct investigation after having found continuous underperformance of the applicant as per the

requirement of 5 Rule 18 (1) of the Code. Mr. Msegeya was emphatic that investigation to ascertain the reasons for underperformance of the employee is mandatory since provision use the word "shall". On that bases he urged this court to revise the CMA decision, quash the award and order the relief sought in the CMA form i.e (F.l). Having carefully examined the record, submissions by the counsel and the law, the Court will address the issue of whether or not the respondent termination was substantively and procedurally fair. If the need will arise, I will also consider the relief(s) available. It is the established principle that for the termination of employee to be considered fair it should be passed on valid reason and fair procedure. Needless to say, there must be substantive fairness and procedural fairness of termination of employment. Section 37 (2) of the ELRA provides that: "(2) A termination of employment by an employer is unfair if the employer fails to prove

- (a) That the reasons for termination is valid;
- (b) That the reason is a fair reason 6
 - (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 The legislature's sprit in the above provision is to ensure that termination of employment is based on valid reason and not on employee will. That spirit goes along with Article 4 of the International Labour Organization Convention (ILO) 158 of 1982, which provides that: "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on operational requirements of the undertaking establishment or service In this matter as I have hinted before, the applicant's employment was terminated on the ground of poor work performance. It is the established principle in law that in each reason for termination need to be dealt with on its merits and a fair procedure applies in each case - 7 Rule 15 (2) of the Code. The law requires Arbitrators and Judges in determining the fairness of termination for poor work performance, to consider that the performance standard is not only reasonable but is also known to the employees, Rule 16 (1) of the Code. In other words, they have to consider and comply with Rule 15 (2), 16, 17 and 18 of the Code which provides for fair procedure. Starting with the issue whether termination was substantively fair, Rule 17 (1) provides that:
 - (1) Any employer, arbitrator or judge who determines whether a termination for poor work is fair shall consider- Ca) Whether or not the employee failed to meet a performance standard;
 - (b) Whether the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
 - (c) The reasons why the employee failed to meet the standard; and 8
 - (d) Whether the employee was afforded a fair opportunity to meet the performance standard As regard the matter at hand having revisited the evidence of both parties and the argument by the learned counsel for the applicant it is undisputed that the applicant did not meet

performance standard which means he was aware of the required performance standard. Also, the applicant is not complaining that the standard was unreasonable. It is undisputed also that the applicant was afforded a fair opportunity to meet the performance standard through PIP from October to December, 2021. In that bases the applicant's complaints are premised on the reasons why he failed to meet the standard. On that, counsel emphatically contended that the performance standard was beyond the applicant's control and was contributed by the respondent. He reasoned that the applicant had no support from his supervisor referred to exhibit RX1, that there was a shortage of human resource and that the respondent stopped to issue loans beyond 40 KM, increased interest rate, reduced the amount of loan and illness. Outrightly, the illness reason was rejected by the CMA in the impugned award that there was no cogent evidence to prove the same 9 since the applicant did not tender any document to prove it. Having gone through the record, specifically exhibit P8 (Performance Review Meeting-Hearing Form) at paragraph 5, it was testified before the hearing committee that the applicant got sick in January to March 2021. For that I differ with the learned CMA Arbitrator on the reason that there was no proof of illness. Notwithstanding of the above fact, I am of the considered position that the applicant's sickness did not contribute to his underperformance. This is because the trend of underperformance according to the evidence by DW1 persisted for the whole year of 2021 notably from July to September, 2021. Also, it was not established by the applicant through his evidence how that sickness which he got in January to March, 2021 affected the performance in October to December, 2021 when he was in the PIP program. The applicant had not made illness factor as one of the challenges he faced through-out the communication with his supervisor as per exhibit RX1. As to the other reasons like that of stopping disbursing loan to clients beyond 40 KM. It was established by the respondent's witnesses that the bar was not only for Mbeya branch but in all areas where there is respondent's branch. On the shortage of human resource, it was DW1's evidence that the respondent set standard of performance to io each Branch Manager according to the available working environment. And the applicant was assisted according to what was required in Mbeya branch. As I have intimated before, the applicant did not challenge the standard of performance he agreed with the respondent. He was also the experienced personnel taking into consideration that he held the position of manager about 10 years before the termination. In my view he ought to take necessary steps with the respondent to make sure his performance matches the standard. Under the circumstances I find that the CMA properly evaluated evidence as far as the validity of the reason for termination is concerned. The first issue is thus answered affirmatively. As regards to the evidence on procedures. The procedures to be followed when an employee is to be terminated for the reason of poor work performance are provided under Rule 18 of the Code. They are multiple, but counsel has confined on two of them. That are procedures under subrule (1) and (4) of Rule 18. He argued that no investigation was conducted by the respondent to establish the reasons for poor performance of the applicant. And that no final warning informing the applicant that he will be terminated if he does not improve. According to the counsel the upshot occasioned injustice to the applicant. He referred ii to this court decision

in the case of Finca Microfinance Bank vs Noel Sangu & another, Labour Revision No. 15 of 2020 at Mbeya (unreported). Conversely, I concur with counsel for the applicant that conducting investigation by an employer is mandatory as per rule 18 (1) of the Code. The mandatory also applies to issuing of warning as per 18 (4) of the same Code. I have gone through the evidence by the parties adduced before the CMA, it was not stated by the respondent's witness if investigation was conducted. There is no investigation report tendered to prove that an investigation was conducted. Concerning warning, I have also scanned the CMA record no formal warning was tendered. There is only evidence by DW1 and DW2 that PIP acts as final warning. With due respect, I do not think if the witnesses were correct. In my understanding PIP does not act as a warning but an opportunity for an employee to improve. On that reason I consider it imperative to quote some part of the PIP letter (exhibit P5) written to the applicant. The pertinent part reads as follow: "Z* would like to inform you that, from October to December you will be under Performance Improvement Plan whereby your performance will be closely monitored 12 monthly and you have the responsibility to ensure your performance is accelerated and achieve average performance rating not below 2.75 (October - December 2021j. Your performance measurements will base on the target signed off with your immediate supervisor. If your performance will not improve during this period, you will be subjected to appear before the Performance Review Meeting." Looking at the quotation above, there is nothing in that letter which can be construed to mean a warning in accordance with Rule 18

- (4) GN No. 42 of 2007 which imperatively provides that "the employer ' shall warn the employee that employment may be terminated if there is no improvement. In that aspect I have been persuaded by the United America Payroll's writing in the topic titled Performance Improvement Plan vs. Written Warning dated January 16, 2023. From (<https://www.uapl.com/performance-improvement-plan-vs-written-warning>) retrieved on 28/08/2023 at 11:56am. In that writing the line between PIP and written warning was drawn in the following terms: 13 "... A PIP is most often considered for employees who are failing to meet deadlines or sales targets; however, it can be used in a number of other circumstances to help your employees succeed. By providing a structured approach for the employee to improve their job performance, the PIP begins by providing a clear explanation as to why their performance is not up to company standards in the first place. Then, the PIP outlines a plan on how the employee could improve their performance and provides a specific timeframe (such as 60, 90, or 120 days) in which they are expected to meet these goals. Ultimately, the intended outcome of a PIP is to see improvement in the employee's performance. The PIP can also highlight gaps in proper training or possible future actions such as demotion, job transfer, or even termination. In order to have the greatest success, it is important for management to schedule regular meetings with the employee to evaluate their progress and keep them on track to reaching their performance goals. ... A written warning is often used by an employer to place an employee on notice that their actions in the workplace are unacceptable. It should also explain the potential consequences in the event the employee does not change their behavior. A written warning is a great way to outline exactly what the employee is

doing wrong, what needs to change, and what will happen if the behavior continues. Written warnings serve more than one purpose as they can encourage employees to improve their performance in order to avoid future disciplinary action, while also providing documentation to support the employer's decision in the event of future employee termination for poor performance." 14 Observing the above differences between the two on both the aim and importance, I may not confidently concur with the evidence adduced by the respondent's witnesses that PIP was a last warning to the applicant. I have also been inspired by the case of Bank of Africa (T) Limited vs Bruce E. Massawe Revision No. 760 of 2019 HOLD at Dar es Salaam (unreported) where it was shown that the employer had issued both a warning letter and thereafter a letter stating that the respective employee will be in PIP. This again, justifies my observation that PIP and warning are two different measures which in my view, the former is relevant to the substantive part while the latter is most appropriate to the procedural part. Having said so, I find that the applicant termination was procedurally unfair. The CMA therefore, erred in finding that it was fair. Now, I have to consider what is the relief(s) the applicant is entitled for being unprocedural terminated. The CMA did not grant any relief to the applicant on the reason that termination was fair both substantively and procedurally. But I have found that termination of the applicant was substantively fair and 15 procedurally unfair. In the case of Elisha J. Sima v. Geita Gold Mining Ltd, Lab. Div, MZA Revision No. 20/2014 it was held that, if it is proved that termination was procedurally unfair the employee is entitled to compensation of 12 months salaries as provided for in section 40 (1)

- (c) of ELRA. That being the position of the law, the applicant in this matter is entitled to a compensation of 12 months salaries as provided for under section 40 (1) (c) of the ELRA. On that basis the CMA award is revised to the extent stated and the applicant shall be paid compensation of 12 months salaries. It is so ordered. 16

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