THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE NO.302/2014

ARISING FROM HCT -CS -320/2013.

ALEX AKANKWASA ……..…….. CLAIMANT

VERSUS

EQUITY BANK ……..……. RESPONDENT

BEFORE:

1. **THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
2. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

PANELISTS

1. MR. ANTHONY WANYAMA

2. MR.FX. MUBUUKE

3. MR. EBYAU FIDEL

AWARD

BRIEF FACTS

On 23/11/2011, the Claimant was employed by the Respondent Bank as a Business Growth Development Manager earning a gross salary of Ugx. 3,300,000/- per month. He was posted to Kabale as the Branch Manager. According to him he diligently executed his duties until May 2013 when he started receiving communications alleging poor performance on his part. It was alleged that he had consistently failed to meet targets and grow the business. On 10/10/2013 he was placed on a performance improvement plan for 1 month. On 17/7/2013 he was issued with a notice of termination. According to him his termination was wrongful and arbitrary, because the Respondent

did not follow the procedures laid down under its Human Resources Policy Manual for dismissal/termination of employees, he was not given opportunity for redeployment, he was job hunted from Barclays Bank and his career was terminated abruptly without any opportunity to maximize his potential.

ISSUES

1. **Whether the termination of the claimant's employment was fair and lawful?**
2. **What remedies are available to the Parties?**

REPRESENTATION

The Claimant was represented by Mr. Himbaza Godfrey and Mr. Alex Alideki Ssali of M/S OSH Advocates, Plot 7 Kampala Road and the Respondent by the Mr.Mpata khalid of The legal Department, Equity Bank (U) Ltd plot 34 Kampala Road.

RESOLUTION OF ISSUES

1.Whether the termination f the claimant's employment was fair and lawful?

Mr. Himbaza Counsel for the Claimant submitted that the Respondent set unrealistic targets to be achieved in a short time including growth of loans, fixed deposits Accounts, Current and Savings Accounts. On 22/05/2012 the Respondent communicated through a one Mwnagangi Jimmy, Head of Credit, to all branches with 110% ratio and below directing them to cease lending and Kabale Branch fell within this category given that by 21/05/2012 the A/D ratio of the Branch was below 110%. That inspite conflicting directives he managed to grow the business steadily although below the unrealistic targets. Counsel contended that the Claimant's efforts were frustrated by bureaucratic rigidities in the Respondent Bank and because of low business in kabale and competition from better service providers.

Counsel contended that the Claimant was terminated by the Respondent for reasons of non-performance, although his letter of termination did not state any reason for his termination. According to Counsel the reason for his termination was deduced from the

letter dated 10/05/2013, that accompanied his performance improvement plan. It stated in part as follows:

> ***"… During this period your performance will be reviewed with you after two weeks. Failure to achieve the set target in any of the given month will call for termination of your employment with the institution."***

According to him, when he raised concerns about his inability to fulfill the unrealistic PIP given the bureaucratic processes in the Respondent, he was assured that the challenges he raised would be addressed but they were never addressed, but intead he was issued with a termination letter which did not disclose the reason for his termination, save that the Bank had taken a decision to terminate him in accordance with his contract.

Counsel contended that the in cases of poor performance the Employment Act stipulated that Natural justice must be observed and in support of this assertion, he cited section 66(1) and (2) of the Employment Act which provides that:

> ***"66. Notification and hearing before termination***
>
> ***(1) Notwithstanding any other provision of this part, an employer shall before reaching a decision to dismiss an employee, on the grounds of misconduct or poor performance explain to the employee, in a language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal and the employee is entitled to have another person of his or her choice present during this explanation,***
>
> ***(2) Notwithstanding any other provision of this part, an employer shall before reaching a decision to dismiss an employee, hear and consider any representations which the employee on the grounds of misconduct or poor performance, and the person, if any chosen by the employee under subsection (1) may make.***

He also cited **Carolyne Turyatemba & Others vs Attorney General Constitutional Petition No.15/2006,** in which the right to be heard was emphasized as a fundamental aspect in the entire area of due process of law. He contended that evidence was led to show that the Claimant was not accorded a hearing before he was terminated and this was confirmed by RW1 who testified that he was not accorded a hearing.

It was further his submission that the Claimant's contract of Employment explicitly provided under clause 15, that his contract was subject to, and formed and integral part of all the Banks Policies and procedures whether specifically referenced or not and other regulatory requirements expected to be within his knowledge and they would be read together with his letter of appointment. According to Counsel the Human Resources Manual which provided under clause 17.8.1 that all recommendations for termination should ensure that the provisions of the disciplinary rules and procedures are followed and 17.8.2 which provides that the recommendations must be based "…*on facts and fairness to ensure that the actions are supported by a third party such as the* Industrial *Court/Tribunal or Ministry of Labour and the Law of natural justice has been applied in all cases of the disciplinary process,"* is one of the stated policy documents.

Counsel contended that the Claimant had made known to the Respondent Management the challenges he was facing and the factors which were beyond him. He contended that the Respondent ought to have investigated these factors before making a decision to terminate the Claimant ,but no investigation was carried out. He insisted that the fact that the Claimant previously served with 2 other Banks, that is, Stanbic Bank and Barclays Bank, prior to his engagement with the Respondent Bank was not controverted in cross examination. He cited **Dr. Paul Kagwa vs Plan International LDC No.175/2014, which** he believed was on all 4s with the instant case. In that case the Claimant was terminated without being accorded a hearing as required by the Respondent's Policy. According to the Respondent before termination the Claimant received several emails expressing dissatisfaction with his performance and after issues of none performance were put to him, he responded to the allegations by email. He was

given the option to resign which he turned down, hence his termination. Court cited section 66 of the Employment Act and stated that ***"In our view, this cannot be described by any stretch of imagination to be an opportunity to be heard given to the Claimant by the respondent even if this court were to believe that the Claimant committed a serious misconduct. Consequently, for the above reasons, we take the position that the Claimant's contract of employment was unlawfully terminated."***

Counsel argued that the Respondent in its defence did not terminate the Claimant's contract on grounds of poor performance as stated under paragraph 10 and 11 of RW1 testimony. RW1 stated as follows:

> ***"10. Whereas the Claimant had challenges meeting his performance targets, his performance was never a consideration for his termination, but the termination was purely in exercise of the Respondent's rights under the employment contract.***
>
> ***11. The termination of the Claimant was fair and lawful and in exercise of the Respondent's rights under the contract and Human Resource Policy and the issue of unfair and unlawful termination does not arise."***

Counsel quoted Florence **Mufumbo Vs Uganda Development Bank, LDC No.138/2014,** at length for the proposition that before terminating an employee the employer must; give him or her a reason, an opportunity to respond to the reason and proof that the reason existed at the time the termination was contemplated.

Counsel further contended that the termination in the instant case did not state the reason for his termination and the Respondent seeks to justify the termination on the ground that, it did not mention anything to do with poor performance, therefore the termination was unlawful either way. If it was based on poor performance the Claimant ought to have been given an opportunity to defend himself and where the termination letter did not disclose the reason for termination, it would be contrary to the law which required disclosure of a reason for termination.

In reply Mr.Khalid Mpata Counsel for the Respondent admitted the facts of the case and stated that the Respondent only exercised its right under the contract to terminate the claimant with notice. According to him, in those circumstances there was no requirement for the Respondent to provide for a hearing because there was no allegations of poor performance.

According to Counsel during cross examination the Claimant admitted to failing to meeting his targets and although he argued that the targets were unrealistic, he did not seek to resign. He further stated that the Claimant admitted to being put on a PIP because he was unable to mobilise deposits which formed the basis for lending and his branch was stopped from lending because it had no deposits. He contended that although the Claimant believes that the bank dismissed him on the grounds of poor performance it was not disputed that he failed to execute the tasks of the Branch Manager to the extent of considering a transfer to another department. He however took no steps to cause the transfer. According to Counsel the Respondent did not frustrate him in any way and in spite of overwhelming evidence that he was not performing, the respondent chose to terminate him under clause 12 of the appointment letter which is allowed under the law. He also cited Section 65(1)(a) of the Employment Act in support of his argument. Section 65(1) provides that:

Termination shall be deemed to take place in the following instances

(a)Where a contract of service is ended by the employer with notice;

Counsel cited **Chris Mukooli vs The New Forest co. Limited HCCS No.173/2008,** in which Justice Musota, held that the allegation of failure to afford the plaintiff a hearing would only be considered if the plaintiff was not paid and did not accept payment in lieu of notice…"

He argued that the Claimant in the instant case admitted that he received his full terminal benefits including payment in lieu of notice.

He reiterated that inspite of having justifiable reason to terminate the Claimant for poor performance this was not the basis of his termination and the respondent only exercised her rights under the contract and therefore the issue of a right to be heard cannot arise. The termination was therefore lawful.

DECISION OF COURT

Section 2 of the Employment Act defines "termination of employment" to mean the discharge of an employee from employment at the initiative of the employer for justifiable reasons other than misconduct, such as expiry of contract, attainment of retirement age, etc. Counsel for the Respondent asserted that the Claimant was terminated in accordance with the contract of employment

This Court in Nassanga **vs Stanbic bank LDC 227/2014** held that ***"Whereas Section 65 is to the effect that termination of a contract of service would be effective if the employer ends it with notice, the procedure for termination is provided for under Section 66 and 68 of the Employment Act 2006."*** *Section 66 of the Employment Act provides that:*

> ***"66. Notification and hearing before termination***
>
> ***(1) Notwithstanding any other provision of this part, an employer shall <u>before</u> (****our emphasis)* ***reaching a decision to dismiss an employee, on the grounds of misconduct or poor performance explain to the employee, in a language the employee may be reasonably expected to understand, <u>the reason for which the employer is considering dismissal (</u>****emphasis ours****) and the employee is entitled to have another person of his or her choice present during this explanation,***
>
> ***(2) Notwithstanding any other provision of this part, an employer shall before reaching a decision to dismiss an employee, hear and consider any representations which the employee on the grounds of misconduct or poor performance, and the person, if any chosen by the employee under subsection (1) may make.***

Section 68 provides that;

> ***"68. Proof of reason for termination***
>
> ***(1) In any claim arising out of termination the employer shall prove the reason or reasons for the dismissal, and where the employer fails to do so the dismissal shall be deemed to have been unfair within the meaning of section 71***
>
> ***(2) The reason or reasons for dismissal shall be matters, which the employer, at the time of dismissal, genuinely believed to exist and which caused him or her to dismiss the employee…."***

Therefore, even if the employer's right to terminate an employee cannot be fettered by Courts of law, the termination must be done in accordance with procedure for termination as enshrined in the Employment Act under Sections 66 and 68 (supra).

It should be emphasized therefore that, in interpreting provisions of a statute, it is important to balance between text and context. Legislation cannot be construed properly if text and context are separated. The meaning of the words of the text should be weighed up against the broader context of the legislation. In **Akeny Robert vs Uganda Communications Commission LDC 023 of 2015,** Court further emphasized that the interpretation of provisions of Statutes concerning the same subject should be construed as complementing each other and not contradicting one another and they should be construed as a whole.

Therefore Sections 2 and 65 which are concerned with termination of employment and sections 66 and 68 which set out the procedure to be followed when terminating employment must be considered and construed together. That was the holding in **Stanbic Bank vs Kiyemba Mutale SCCA No.2/2010, as** we understand it.

We are further fortified by the holding in the recent *Supreme Court decision in* ***Hilda Musinguzi Vs Stanbic bank (U) ltd SCCA 05/2016, in*** *which Justice Mangutsya JSC, held that:*

"… the right of the employer to terminate a contract cannot be fettered by the Court so long as the procedure for termination is followed to ensure that no employees contract is terminated at the whims of the employer and if it were to happen the employee would be entitled to compensation…" (emphasis ours)

Article 4 of the **Termination of Employment Convention No. 158,** which was cited with approval in **Okuo Constant vs Sta*nbic Bank LDC No 171/2014,*** explicitly provides that: ***"The employment of a worker should not be "terminated unless there is valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertakings, establishment or service."***

We therefore do not accept the assertion by Counsel for the Respondent that in spite of overwhelming evidence that the Claimant was performing poorly, the Respondent terminated him without making reference to his poor performance but terminated him in accordance with the contract of employment and section 65(1) (a) of the Employment Act already cited above.

Given the provisions under Sections 66 and 68(supra), make it mandatory for the Respondent to give the Claimant a reason or reasons why he was contemplated for termination before the termination actually took effect and given that the Respondent was also obliged to give him an opportunity to respond to the reason, we have no reason to depart from the holding in **Dr. Paul Kagwa Vs Plan International LDC No.175/2014, Florence Mufumbo Vs Uganda Development Bank, LDC No.138/2014,** and several other Cases that ***"… whether the employer chooses to "terminate" or "dismiss" an employee, such employee is entitled to reasons for the dismissal or termination. In employing the employee, we strongly believe that the employer had reason to so employ him/her. In the same way, in terminating or dismissing the employee there ought to be reason for the decision.***

It is not disputed that the Respondent stated no reason in the Claimant's letter of termination and evidence led in court indicated that no reason was given to the Claimant before he was issued with the termination letter. It was also not disputed that he was not accorded a hearing before he was terminated. Therefore, the termination was substantively and procedurally unlawful.

We therefore find, that the Claimant was unlawfully terminated.

2.What remedies are available to the Parties?

Having found that the Claimant was unlawfully terminated, he is entitled to some remedies. He prayed for the following

(a) recovery of the monthly contribution to the Provident fund of 5,051, 173/=,
(b) compensatory order,
(c) Severance allowances
(d) General Damages for wrongful dismissal
(e) Exemplary and aggravated damages
(f) interest on (c), (d) and (e)an at 20% from the date of cause of action till payment in full.
(g) Cost of the suit.

He however withdrew the claim for the payment of provident fund, because it was paid to him in full. He also did not plead repatriation, although he argued that it was conversed in the witness statement.

It is trite that parties are bound by their pleadings unless the pleadings are amended with leave of Court. In **Adetoun Oladeji (NIG) vs Nigeria Breweries PLV+C S.C, 91/2002** cited in **Independent Electrol and Boundaries Commission and anor vs Stephen Mutinda Mule & 3 others CA** Judge Pius Adremi J.S.C stated that ; *"... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support an averment in the pleadings or put in another way, which is at variance with the averments of the pleadings goes to*

no issue and must be disregarded…" We associate ourselves with this holding and therefore we shall disregard the claim for Repatriation because it was not pleaded.

b) Compensatory order

Although the claimant cited Section 77 Act as providing for a compensatory order, with due Respect the Section actually is Section 78 and it mandates the labour officer to make a compensatory order of 1 month and grants him or her discretion to make additional compensation of up to 3 months wages of the dismissed employee's wages. This section only applies to labour officers. In **Edace Micheal vs Watoto Child Care Ministries LD Appeal No.016/2015,** this court held that section 78 *"... in our view covers whatever damages that could have arisen from illegal termination although section 78(3) provides for maximum amount of additional compensation which in our view is equivalent to damages.*

Unlike the Industrial Court, the discretion of the Labour officer to award such damages under section 78(3) is limited to 3 months wages of the dismissed employee's salary…" It was settled in **African Field Epideemiology Network (AFNET) vs Peter Waswa Kityaba CA .No.0124/2017** that: "***….the Industrial Court, can determine any dispute which can be filed in the high court .In that respect it has unlimited jurisdiction on the question of remedies that it can lawfully order…".*** In the circumstances this court can not make a compensatory order as provided under Section 78, this claim therefore fails.

General Damages

In **Kapio Simon vs centenary Bank LDC No. 300/2015, Okuo Constant vs Sta*nbic Bank LDC No 171/2014,* Akeny Robert vs Uganda Communications Commission LDC 023 of 2015,** and several other cases this Court has held that in addition to the remedies prescribed under the Employment Act, an employee who is unlawfully terminated is entitled to an award of General damages. General damages are intended to return the aggrieved party to as near as possible in monetary terms to the position if

the wrong complained of had not been occasioned. They are compensatory in nature. Counsel cited **Obonyo & Another Vs Municipal Council of Kisumu 1971(EA,)** and **Dr.Paul Kagwa**(supra for the legal proposition that in making such an award factors such as the anguish and inconvenience suffered as a result of the arbitrary and unfair termination should be taken into consideration. He also cited **Florence Mufumba(supra)** the claimant was awarded General damages of Ugx.150,000,000/= he prayed for an award of Ugx. 100,000,000/=

By the time the Claimant was terminated he had served the respondent for 1year and 6 months. He was earning Ugx. 3,300,000/= per month. We think an award of **Ugx. 9,600,000/=**is sufficient as general damages.

Aggravated Damages

Aggravated damages are compensatory in nature but they are damages enhanced on account of aggravation such as malice and arrogance. In **Obongo vs Kisumu Municipal Council (1971) EA CA at 91**, cited with approval in **Ahmed Ibrahim Bholm Vs Car & General ,** Spray J V.P in his lead judgement stated that

> *" It might also be argued that aggravated damages would have been than exemplary. The distinction is not always easy to see and is to some extent an unreal one.it is well established that when damages are at large and a court is making a general award , it, may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff, as for example, by causing him humiliation or distress . Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature. On the other hand, exemplary damages are completely outside the field of compensation and although the benefit of them goes to the person who was wronged, their object is entirely punitive. In the present case, it is not clear how far damages at large were*

contemplated either in the consent judgement or in the proceedings that followed…"

No aggravating factors were pleaded and proved therefore we have no basis to award these damages.

Severance pay

Section 87(a) of the Employment Act, entitles an employee who has been in an employer's continuous service for a period of 6 months to severance pay if he or she is found to have been unfairly dismissed/terminated. Section 89 of the Act provides that severance allowance should be negotiable between the employer and employee. This court in **DONNA KAMULI VS DFCU BANK LDC 002 OF 2015,** held that where the employer and employee have not agreed on a method of calculating severance pay, the reasonable method shall be payment of 1 month's salary for every year the employee has served. This decision was upheld in **African Field Epidemiology Network (AFNET) vs Peter Waswa Kityaba CA .No.0124/2017.** In the instant case we established that the claimant was employed on the 23/11/2011 and terminated around may 2013 had served 18 months. In accordance with the calculation in Donna Kamuli (supra) he would therefore be entitled to 1 and ½ month's salary as Severance pay amounting to **Ugx.4,950,000/=** as severance pay.

Interest

Due to inflation, an interest of 18% per annum shall accrue on all pecuniary awards made from the date of this judgement until payment in full.

Costs

No order as to costs is made.

In conclusion an award is entered for the Claimant in the following terms.

1. A declaration that he was unlawfully terminated.
2. An award of Ugx.9,600,000/- as general damages.

3. An award of Ugx,4,950,000 as severance pay.
4. Interest of 18% on 2 and 3 above form date of judgement until payment in full
5. No order as to costs.

Delivered and signed by:

1.THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE ……

2.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA ……

PANELISTS

1. MR. ANTHONY WANYAMA …….

2. MR.FX. MUBUUKE …….

3. MR. EBYAU FIDEL ……..

DATE: 21ST NOVEMBER 2019