THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE CLAIM NO. 051 OF 2015
(ARISING FROM HCT-CS NO. 273 OF 2013)

STEPHEN MUKOOBA ……..CLAIMANT

VERSUS

OPPORTUNITY BANK……RESPONDENT

BEFORE

1. Hon. Chief Judge Ruhinda Asaph Ntengye
2. Hon. Lady Justice Lillian Linda Tumusiime Mugisha

PANELISTS

1. Mr. Bwire John Abraham
2. Mr. Mavunwa Edson Han
3. Ms. Julian Nyachwo

AWARD

The claimant filed the above claim against the respondent alleging unlawful termination and prayed for (among others) aggravated and general damages.

According to a joint scheduling memorandum filed in court on 21/10/2019 signed by both counsel, the facts agreed are:

The claimant was appointed on the 20th July 2009 as head of operations of the respondent Bank, formerly known as Faulu Uganda Limited and subsequently he was appointed in march 2000 as Chief Relations Officer, a position he held until 24/9/2012 when the respondent by letter terminated his services.

In April 2011, M/s. Bushira Property Consultants obtained a loan facility from the defendant bank for the purchase of property comprised in Block 7 Plot 763, land at Ndeeba pledged by a one Unia Kamya with the defendant as Security for a loan facility. Prior to the lending by the defendant Bank, the plaintiff and M/s. Bushira property consultants limited had executed a sale agreement on the 7th day of March 2011 for the purchase of property comprised in Block 102 Plot 203 land at

Jokelera, Wakiso owned by the plaintiff/claimant. The defendant bank suspended and ultimately terminated the plaintiff's employment."

Agreed issues were:

1. Whether the respondent in terminating the contract of the claimant followed procedures in the Human Resource Manual.
2. Whether in dealing with the respondent's customer, M/s. Bushira Property Consultants Limited, the claimants breached a conflict of interest policy in the Human Resource Manual, warranting termination.
3. Whether the contract of employment was lawfully terminated.
4. What remedies are available to the parties?

Evidence:

The claimant led evidence from himself and a one Herbert Kanyeihamba. The respondent adduced evidence from one witness, one Phillip Karugaba, Chairman Board of Directors of the respondent.

According to the claimant (in his evidence in Chief), because of challenges in the customer relationship department which included ghost loans and orphaned portfolios, he was transferred from the operations department to the Human Relations department so as to sort out the challenges. He carried out staff trainings on how to carryout due diligence in the loan portfolio and how to perfect loan growth and maintain the loan portfolio.

When in 2012 a new Executive Director stopped him from approving loans and when a few of them started going bad, he was suspected of approving them but on investigation it was discovered that the approval was by the executive Committee. He was suspended in August 2012. He was informed of the disciplinary hearing to take place on 6/9/2012 which he objected to for being carried out by Junior Officers. On 7/9/2012 he received an email for a hearing due on 12/9/2012. The hearing was at the chambers of the chairman of the Board of the respondent which made him uncomfortable. He called his colleague to accompany him to the hearing but he was rejected by the committee. He was forced to seek an alternative in the names of one M/s. Sarah Nabwire who he called for only compliance of the requirement to appear with someone.

According to him, he only learnt of the charge of conflict of interest at the hearing which he denied.

According to Herbert Kanyeihamba, a witness for the claimant, the claimant as a relationship Manager introduced systems that equipped bank officials to issue loans of more than 15,000,000/= leading to growth of the loan portfolio to over 35 million/-. He as branch manager of Nateete branch, confirmed to court that the claimant as an individual and as his supervisor, never influenced any issuing of any loans which was done by an approving committee. In August 2012 he was suspended and on inquiry he was informed that the reason was that he was trying to cover up the claimant in his fraudulent deals and when the claimant was brought before the disciplinary committee he asked him to accompany him but the committee rejected him.

The witness also confirmed that he knew Bushira Property Consultants as a good customer of Natetee branch and that he introduced to them the idea of buying the property from one Unia Kamya who had a bad loan in the bank and that he as branch manager participated in the branch credit committee to approve the loan and forwarded the file to head office credit committee chaired by the claimant which approved the loan.

The respondent's only witness, one Phillip Karugaba, testified that as Chairman of the Board of Directors he presided over the disciplinary proceedings involving the claimant who had requested that the Board committee conducts the hearing. According to him, the claimant as a member of the Executive credit Committee, was mandated to participate in the assessment and approval of all loans forwarded from the various branches. He, the claimant, participated in assessment of the loan of one Bushira Property Consultants with whom he had dealings in a private land transaction in which Bushira owed him money without disclosing this interest to the respondent. Hearings were conducted for 2 days and the committee was not satisfied with his defense to the charges especially the one relating to conflict of interest. He was advised to resign which advice he declined leading to his termination.

SUBMISSIONS:

Mr. Akampurira Keneth for the claimant submitted that the fact that the hearing proceeded without availing the claimant the investigative report which was relied

upon by the committee to terminate him, made the hearing partial as against the **Human Resource Manual clause 2.14**. According to counsel this was a trial by ambush which violated the right to a fair hearing.

In his submission the sudden change of venue of the hearing from the familiar respondent's premises to the law chambers of the chairman of the disciplinary hearing without the consent of the claimant was in total violation of the principal of fairness and uniformity in the disciplinary actions as opposed to provisions of **clause 2.14 of the Business Ethics and Conduct Policy of the respondent**. It was submitted for the claimant that the refusal by the committee to accept the claimant's representative as a witness forcing him to quickly get an alternative infringed on the claimant's rights as provided under **clause 2.14.1 of the Business Ethics and Personal Conduct Policy**, rendering the termination unfair and unlawful. On the general principal of a fair hearing counsel relied on the authority of this court in **PATRICK OUTA VS BARCLAYS BANK OF UGANDA, LDC No. 79/2014.**

In his submission, no conflict of interest existed when the claimant entered into a private land deal with Bushira Property Consultants to purchase Property of one Kamya who had failed to pay the bank since the claimant did not benefit from the loan granted to the respondent's customer, Bushira Property Consultants as provided in **clause 7.10 Human Resource Management Policy and clause 2.11 of the Business Ethics and Professional Conduct Policy**. Instead according to counsel in cross-examination the respondent's only witness confirmed that the bank benefited from the transaction since the bad loan was paid off fully and the books of accounts registered a profit on the account in question.

It was the submission of counsel for the claimant that since the bank was not engaged in the business of selling property there could not be conflict of interest when the claimant engaged himself in selling property to the respondent's customer. There was no competition between the respondent and the claimant in his engagement with the customer.

We have not had the benefit of looking at the submissions of the respondent since the record does not reveal that the respondent filed any final submissions and we take exception for failure of counsel in this noble task of assisting the court to reach a fair decision. This Court as usual issued time lines within which

counsel would file submissions but counsel for the respondent failed or neglected to do the same.

Evaluation of evidence and decision of the court:

We shall resolve the issues in the manner that counsel for the claimant raised and submitted on them. He combined issue No. 1 with issue No. 2 in the following way:

Whether the respondent in terminating the claimant's contract/services complied with its set procedures in the Human Resource Manual & Policy and whether the termination was lawful?

On internalizing the submissions of counsel for the claimant on the above combined issues, we form the opinion that his submission is substantively faulting the respondent on the principle of a fair hearing which according to him resulted in the illegal termination of the contract. In faulting the respondent for failure to comply with this principle, counsel relied on the authority of this court in **Patrick Outa Vs Barclays Bank of Uganda** (supra) in which this court stated:

> **"The right to be heard as expounded under Article 28 of the constitution as well as Section 66(1) of the Employment Act envisages the right of an accused or a defendant to know the nature of the charges against him or her and to be availed opportunity to defend himself before an independent tribunal. This means that the charges ought to be clearly spelt out including the particulars of the said charges. The charges should be such that the defendant comprehends and appreciates them so as to be able to offer a defense…. Merely being able to appear before a disciplinary committee without such particulars in our view does not constitute a fair hearing…"**

Counsel for the claimant also faulted the respondent for breaching its own Business Ethics and Conduct Policy exhibited as R16, clause 2.14 which states:

> **"The company's own best interest lies in ensuring fair treatment of all employees in making certain that disciplinary actions are prompt, uniform and impartial".**

According to counsel the fair hearing was affected as well by the respondent's rejection of the claimant's choice of a person to represent him contrary to **clause 2.14.1 of the disciplinary procedures** as stated in the above policy.

The evidence on the record reveals that although the claimant was not availed the full investigation report of the Audit department of the respondent, he was given the detail of the report at the hearing when the case was being presented to him.

Whereas the investigation report was said to be a confidential report as an in house staff to staff sensitive information, it is our considered opinion that the claimant having been subjected to a disciplinary hearing basing on the same report, he ought to have been able to access the same. We did not find any good reason as to why extracts of the report that concerned his charges were not availed to the claimant. Such extracts would give the claimant the opportunity to effectively defend himself while at the same time keeping the rest of the report as confidential as the respondent needed it to be. We are not convinced that the sections of the report concerning the specific charges against the claimant were any more confidential when they became a subject of the disciplinary proceedings and eventually were to be in the minutes which became part of the court record, a public document.

We therefore agree to the submission of the claimant that by failing to share with him sections of the investigation report that concerned his alleged charges, the respondent infringed on his rights pertaining to a fair hearing.

The claimant was entitled to attend the hearing with a person of his choice. He was denied the person of his first choice on the ground that this person was also to appear before the disciplinary hearing on issues closely related to the issues at hand against the claimant and as the witness of the respondent testified, because he would not be an independent witness.

We do not think that an employee's choice of a person to appear with before the disciplinary hearing should in anyway be vetted by the committee. The law in our view gives a huge latitude to the employee to choose who he should appear with. The disciplinary committee in our view has no alternative but to allow the choice of the employee to be present. The purpose of the person accompanying the employee in our view is to give confidence to the employee during the proceedings and where necessary to offer representations to the committee on behalf of the employee. The fact that this person was to appear before the same

committee as a party to the disciplinary proceedings in a similar case did not in any way preclude him from giving company to his fellow employee. The fears of the committee were therefore unfounded. By this denial the committee/ respondent violated some tenets of a fair hearing. Having said this, we do not think that the substitution of the first choice of such an accompanying employee for any other choice affected substantive Justice since the part played by the substitute was exactly the same part the first choice would have played.

We do not subscribe to the contention of counsel for the claimant that the change of venue of the disciplinary hearing had a negative effect on the fairness of the process. We are not convinced that this provided an un conducive environment in the disciplinary process since no evidence was adduced to establish the un conduciveness as compared to the head office where normally such proceedings would take place. There was no evidence that the claimant or his witnesses were intimidated by the new environment or that they were in any way inconvenienced so as to affect the fairness of the process. There was no evidence of breach of **clause 2.14.1 of the Disciplinary Procedure in the Business Ethics and Conduct Policy of the respondent exhibit R(6).** As this court has pointed out in the case of **GRACE MATOVU vs UMEME LTD Labour dispute claim 004/2014 relying on CAROLINE KALIISA vs HIMA CEMENT LTD HCCS 84/2014 ,**
a disciplinary hearing is not a court of law hearing. Therefore the disciplinary committee is not expected to strictly follow technical procedures or rules of evidence as required or expected from a court of law. It suffices for such a committee to make sure that most fundamental tenets of a fair hearing have been complied with. It was the submission of counsel for the claimant that the disciplinary committee exhibited partiality when they failed to avail extracts of the investigation report to him for his defense and when Mr. Karugaba as prosecutor also was a judge in the same cause.

The principle of impartiality in the judicial and quasi-judicial processes is very cardinal in the dispensation of justice. This is the reason Article 28 of the Constitution provides

“28 Right to a fair hearing

1) **In the determination of Civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing**

before an independent and impartial court or tribunal established by law".

Being partial connotes bias. It means that the court, tribunal or other institution or person involved in resolving a dispute has a tendency of favoring one party against the other. This tendency may be exhibited before or during the hearing of the dispute. In our understanding of the submissions of counsel for the claimant, failure of providing the claimant with the extracts of the investigation report was an act intended to favour the respondent in establishing its case of conflict of interest against him. With due respect to counsel, we do not accept this contention in the circumstances of the instant case. The claimant was informed of the infraction of conflict of interest (and others) and we believe he received it on the same date of 6/09/2012 because he acknowledged receipt in an email dated 7/09/2012 at 2.56p.pm (see **exhibit C9)** although in the same email he sought actual specific details of the allegations. At the hearing, on 12/09/2019, the details of how, when and in what respect the infraction of conflict of interest arose was explained to the claimant to which he ably replied. The same applied to the infraction of negligence leading to reckless lending.

As we appreciate the concerns of the claimant about the failure of the respondent to avail to him the investigation report earlier on, we do not appreciate the contention that this per se constituted partiality or bias against the claimant.

It was contended that the board committee on Human Resource which constituted disciplinary hearing that resulted into a decision to terminate the claimant was at the same time the prosecutor which made it partial.

The evidence on the record reveals that it was the claimant who requested the Board to constitute itself into a disciplinary committee which request was granted because of the senior position of the claimant. His objection to one of the members, one Alfred Tumwebaze was upheld and he did not participate in the hearing. The claimant cannot therefore be heard to say that one Karugaba , a member of the board brought charges against him and at the same time sat in judgement.

The principal that no person should be a judge in his own cause originates from the need to provide a fair hearing as this principal excludes possibilities of bias.

In our considered opinion a judge would be participating in his own cause if he has a beneficial interest either directly or indirectly in the result of the cause before him or her.

In employer/employee relationships however, the principal of trust and confidence between the parties is very fundamental. The two parties ordinarily keep working together for as long as both exhibit this principal.
Once the employer loose the trust and confidence he/or she has in the employee the relationship cracks and dies. The nature of this relationship demands that it is not necessary (although possible) to involve a completely independent adjudicator possibly outside the relationship once the cracks develop. Consequently it is acceptable for an owner of a small enterprise to, for example ,question his employee as to why the employee did whatever he/she did to the detriment of the business and after hearing the explanation, terminate the services of such employee.

The question as to whether such employee got a fair hearing or appeared before an impartial tribunal cannot be answered in the same terms as in larger enterprises where various departments are part of the enterprise.

Even in bigger enterprises like the instant respondent and other organizations, the termination of services of an employee rotates around loss of trust and confidence in the employee. It is therefore only natural that unlike in the court room, the judge or the tribunal is knowledgeable about alleged infractions within the organization. Therefore the mere fact that one or more members of the disciplinary committee is/are aware or more aware than others of the infractions and how they may have occurred, may not necessarily impact on the partiality of the member or fair hearing of the matter.

In the case of **Patrick Outa Vs Barclays Bank** (supra) cited by counsel for the claimant, there was an allegation by **"Whistle blowers"** that the claimant had demanded bribes to process a loan. The only information available to the claimant was that a customer, who did not want to be disclosed, made a statement that he, the claimant, had taken a bribe and he was expected to defend himself against this statement at the disciplinary hearing.

In the instant case the claimant was informed of the charges before he appeared before the disciplinary committee and when he appeared he was given the details of the charges. It transpired that the claimant in the instant case admitted having sat with others to approve a loan, an act that according to the respondent constituted the charge of conflict of interest which was the reason of the disciplinary proceedings.

Given this state of affairs in both cases, it is safer to take the position that whereas in the **Patrick Outa case** the claimant was completely ignorant of the nature and origin of the charges, in the instant case the claimant was aware of the nature, origin and circumstances surrounding the charges against him.

Following the above discussion we take the position that since the claimant was aware of the nature, origin and circumstances of the charges against him to which he offered an explanation, the fact that he was not availed extracts of the investigation report did not fundamentally affect the impartiality of the disciplinary committee or the fairness of the disciplinary process.

The same applied to the change of venue, the fact that it was a committee of the Board of the respondent that constituted the disciplinary committee and the fact that a first choice of an employee to accompany the claimant was rejected. We do not see anything to suggest that the respondent breached its set procedures in the **Human Resource Manual**, particularly the **Business Ethics and Conduct Policy exhibited as "R 16" at page 100 of the respondent trial bundle clause 2.14 thereof**. The first leg of issue 1 and 2 is therefore decided in the affirmative.
The second leg of the issue: whether termination was lawful will be discussed together with issue 2:

whether there was conflict of interest when the claimant executed a sale and purchase agreement with the bank's customer:

Conflict of interest is defined in **clause 7.10 of the Human Management Policy and clause 2.11 of the Business Ethics and Professional Conduct** Policy both of the respondent. It reads

> "**…an actual or potential conflict of interest occurs when an employee is in a position to influence a decision or be influenced that may result in a**

personal gain for that employee or for a relative as a result of the company business dealing."

"…personal gain may result not only in cases where an employee or a relative has a significant ownership in a firm with which the company does business, but also when an employee or relative receives any kickbacks, bribe, substantial gift or special consideration as a result of any transaction or business dealings involving the company."

It was contended for the claimant that since the claimant did not benefit from the transaction and yet the bank benefited, and since the transaction related to a private land sale the kind of transaction that was not the core business of the respondent, the claimant was not conflicted at all as he was not competing with the respondent as he entered into the transaction.

Evidence was led and the claimant did not contest the same, that the claimant executed a sale agreement with Bushira Property Consultants, a customer of the respondent, for sale of land. The agreement provided (among others) that the purchaser would pay a second installment 30 days from 7/3/2011, the date of the agreement and that another 133,000,000/= would be paid 12 months from the same date.

On the same date the same Bushira Property Consultants entered into a sale agreement of a different piece of land which originally had been mortgaged to the respondent bank for a loan that was going bad. The agreement provided (among other things) that the purchaser would pay first the loan, and then squatters.

Evidence was led and the claimant did not contest the same, that one month after these two transactions, the same Bushira Properties applied for a loan principally to pay off property in the second transaction, mortgaged with the bank. As chief relations officer of the respondent and apparently in the interest of the respondent on 1/3/2011, the claimant had interested Bushira Consultants in buying off the property that was mortgaged to the respondent and the claimant even proposed that the Bank would finance the transaction. In our considered opinion both land transactions having been made only six days after the claimant had

interested the purchaser with an assurance that the respondent would finance the same, raised suspicion.

It may not be too farfetched to conclude that as the claimant was entering into his private dealings he had in mind that Bushira Properties would get a loan and use part of it to clear his financial obligations to him. At the same time Bushira Properties was comfortable since she would get financing to do both transactions. It is therefore not surprising that a month later Bushira Properties applied for the loan which was assessed and granted.

We do not accept the contention of the claimant that he was not conflicted when he sat as part of the bank's credit committee to approve a loan facility for Bushira Property consultants for the purpose of purchasing the already mortgaged property to the bank. We form the considered opinion that since the claimant had hardly a month before entered into a sale agreement with the same Bushira Properties, he had a duty to disclose this fact to the credit committee so as to avoid conflict of interest. In the alternative he was expected to lead evidence to show that at the time he sat with the credit committee to approve the loan, there were no obligations arising from the sale agreement between him and the loan applicant. On the contrary in cross examination, the claimant revealed that at the time he sat to consider and approve the loan, Bushira Properties consultants still owed him money under the said land transaction.

In our considered opinion, **clause 7.10 and clause 2.11 of the Human Resource Management Policy** and the **Business Ethics and Professional conduct Policy create** a conflict of interest where an employee is able to influence a decision that may result in a personal benefit. Since Bushira Properties still owned money to the claimant, there was no doubt that the claimant was aware that approval of the loan was likely to result in payment of the money owed to him. The fact that subsequently Bushira properties did not use part of the loan to settle this obligation, and the fact that the bank eventually benefitted by having the bad loan paid off fully and by registering a profit on that account, did not in our view erase the original potential benefit expected by the claimant from loan approval.

The courts have taken judicial notice of the fact that the banks keep custody of money for other people and that therefore the officials of the banks are expected to take the greatest care while handling transactions involving such monies. Thus in **Bwengye Herbert Vs Eco Bank LDC 135/2015,** this court held the claimant culpable as relationship manager of the respondent bank for having presented a loan application to the credit committee well knowing the unacceptable risk portfolio of the applicant.

In **Barclays Bank of Uganda Vs Godfrey Mubiru SCCA No. 1 of 1998**, the Hon. Justice Kanyeihamba JSC, as he then was, stated:

> **"Managers in the banking business have to be particularly careful and exercise a duty of care more diligently than managers of most businesses. This is because banks managers control money belonging to other people and institutions, perhaps in their thousands and therefore are in a special fiduciary relationship…… Moreover, it is my opinion that in the banking business any careless act or omission if not quickly remedied, is likely to cause great losses to the bank and its customers….."**

In the instant case we are positive that the decision of the claimant to sit in approval of the loan to Bushira properties Consultant, well knowing that part of the loan was likely to go towards paying him, especially taking the decision without informing the loan committee or any other authority about the indebtedness to him of Bushira Properties consultants, made him as culpable as the claimant in **Bwengye Herbert Vs Eco Bank (supra).**

As a relationship manager of the respondent bank and as a member of the Executive Credit Committee, it was the claimant's fundamental obligation to inform the respondent about the interest he had in the loan application of Bushira Consultants. In contravention of **Section 69(3) of the Employment Act,** by committing an act of the conflict of interest, he fundamentally breached his obligation and therefore the respondent was entitled to dismiss him, if necessary, summarily.

We accordingly find that the termination was lawful.

The last issue is:

What remedies are available to the parties?

Although this court has found that the claimant committed an act of conflict of interest constituting a fundamental breach of his obligations as a relationship manager and member of the executive credit committee, we have at the same time found that not all the tenets of a fair hearing were exhibited especially when the claimant was not availed extracts of the investigation report before appearing for a disciplinary hearing.

Section 66(4) of the Employment Act provides

> **"Irrespective of whether any dismissal as a summary dismissal is justified or whether the dismissal of the employee is fair, an employer who fails to comply with this section is liable to pay the employee a sum equivalent to for weeks net pay."**

The whole of **Section 66** is about all the tenets of a fair hearing including the right of the claimant to have a person of his choice to appear with him during the hearing. We have faulted the respondent for rejecting the person of the claimant's choice to be present at the hearing and also the respondent's failure to avail the claimant with extracts of the investigation report.

In light of **Sections 69(3) and 66(4) of the Employment Act** and in light of the finding that the claimant was not unlawfully terminated, we form the opinion that he deserves four weeks net pay and we so order accordingly.

The claim fails with no order as to costs.

Signed by:

1. Hon. Chief Judge Ruhinda Asaph Ntengye …….
2. Hon. Lady Justice Lillian Linda Tumusiime Mugisha …….

PANELISTS

1. Mr. Bwire John Abraham …….
2. Mr. Mavunwa Edson Han …….
3. Ms. Julian Nyachwo …….

Dated: 30/4/2019