IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 481 OF 2020

(CORAM: MKUYE, J.A., LEVIRA, J.A. And MAIGE, J.A.)

BARCLAYS BANK (T) LIMITED .....APPELLANT

VERSUS

AYYAM MATESSA .....RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania, Labour Revision at Dar es Salaam)

(Aboud, J.)

Dated 2nd day of October, 2020
in
Labour Revision No. 392 of 2015

JUDGMENT OF THE COURT

28th March & 12th April, 2022

MAIGE, J.A.

At the Commission for Mediation and Arbitration ("the CMA"), the respondent was a complainant and the appellant the respondent in a complaint for unfair termination of service. The complaint, it would appear, was disposed of at the level of compulsory mediation before the same had been referred to arbitration. The record shows that, while the matter was still under mediation and after lapse of hardly a year, the mediator, for the reason of the absence of the appellant,

issued an order to proceed ex *parte* against the appellant *and* subsequently proceeded to arbitrate the complaint *ex parte* and pronounced an *ex parte* award against her.

Being aggrieved by the decision, the appellant unsuccessfully applied for setting aside the *ex parte* award. Her further attempt to challenge both the award and the order refusing to set it aside by way of a revision to the High Court, Labour Division ("the Labour Court") but could not materialize. The Labour Court (Aboud, J) dismissed the application for want of merit. Still aggrieved, the appellant has knocked the door of the Court challenging the correctness of the decision of the Labour Court on the following grounds:

1. That the Judge erred in law for failure to give a proper interpretation to the provisions of section 87(3) (b) of the Employment and Labour Relations Act, 2004 read together with Rule 14(2) (a) (ii) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules G.N. No. 67 of 2007.

2. That the Judge erred in law and fact by holding that it was proper for the mediator to convert himself to an arbitrator and has powers to arbitrate the dispute.

3. That the Judge erred in law and fact by deciding issue no. 2 in favor of the respondent herein while on the other hand the Court stated that the CMA records in the case are misplaced.

4. That the Judge erred in law and fact for holding that the applicant failed to adduce a sufficient cause to set aside the ex parte award.

At the hearing of the appeal, Messrs. Paschal Kamala and Antipas Latama, both learned advocates, appeared for the appellant whereas their learned friend, advocate, Adman Chitale appeared for the respondent. In compliance with the requirements of rule 106 (1) and (7) of the Court of Appeal Rules, 2009 ("the Rules"), the counsel filed the relevant written submissions for and against the appeal.

When given the floor to present his oral arguments, Mr. Kamala fully adopted the substances of his written submissions and urged the Court to allow the appeal. In addition, the counsel criticized the Labour Court in confirming the award of the CMA founded on evidence, which contrary to the law, was taken without oaths or affirmation. Armed with the principle in **North Mara Gold Mine Limited v. Khalid Abdallah Salum**, Civil Appeal No. 463 of 2020 (unreported), the

counsel urged the Court in the alternative, to allow the appeal on this ground.

In a similar way, Mr. Chitale fully adopted the written submissions in reply to form part of his oral arguments and entirely supported the concurrent opinions of the CMA and Labour Court. As regards the issue of the evidence being taken without oaths or affirmation, the counsel was quick to admit that it was a fatal error which would suffice to render the decision and proceedings of the CMA null and void. He submitted however that, the appropriate way forward should be to order a fresh *ex parte* hearing.

With the above exposition of the nature of the case, it is appropriate to direct our minds on the merit or otherwise of the appeal. We shall start our deliberations with the first two grounds of appeal which shall be considered together under one issue namely; whether the mediator was right in the circumstance of this case, to hear and determine the complaint *ex parte* under section 87(3) (b) of the Employment and Labour Relations Act, CAP 366 R.E. 2019 ("the ELRA") read together with rule 14(2) (a) (ii) of the Labour Institutions

(Meditation and Arbitration Guidelines) Rules G.N. No. 67 of 2007 ("the G.N. 67 of 2007").

In his submissions on this point, Mr. Kamala having sought inspiration from a dictionary definition of the term "to decide" used in the respective provision, blamed the Labour Court for erroneously defining the same to mean "to arbitrate". The counsel assigned numerous reasons why he viewed such interpretation as incorrect.

First, it is against the sprit and role of a mediator envisaged in the ELRA which is to mediate the parties. Second, the provision of rule 14(3) of the G.N. 67 of 2007 restricts a mediator to decide in favor of the party present where an adverse party has defaulted to appear. He submitted therefore that, with such restrictions and in the absence of specific provisions giving jurisdiction to the mediator to arbitrate, the Labour Court was expected to make use of the ordinary practice under O. VIII r. 29 of the Civil Procedure Code CAP. 33, R.E 2019 ("the CPC") as amended by G.N. No. 381 of 2019 and rule 36(1) and (2) of the High Court (Commercial Division) Procedural Rules, 2012 GN No. 250 of 2012 as amended by GN 107 of 2019 and remit the matter to the

director of the CMA or the relevant officer in charge for necessary orders.

More or less similar procedures, Mr. Kamala further submitted, are in other jurisdictions such Kenya and South Africa. To justify his claim, the counsel cited the case of **D. Manji Construction Limited v. Farmers Industry Limited** [2018] EKLR for Kenya and **Premier Gauteng & Another v. Ramabulana & Others** (2008) 29 ILJ 1099 (LAC) for South Africa.

In the strength of the above submissions, the counsel has urged the Court to employ the purposive rule of interpretation and construe the provisions so as not go beyond the spirit of mediation under the provisions of the ELRA.

Under the labour laws, he clarified, the powers to arbitrate is within terrain of the arbitrators. A mediator can only assume powers of arbitration under combined mediation and arbitration procedure set out in section 88 (6) of the ELRA read together with rule 30 of the G.N. No. 67 of 2007 subject to prior consent of the parties which was not the case in the instant matter, he added.

For the respondent, it was submitted that the provisions in question were correctly interpretated as to confer discretional powers to the mediator to decide the complaint on merits where, as in this case, the respondent defaulted to appear without good cause. He prayed therefore that, the appeal be dismissed.

Having heard the rival submissions, we shall address hereunder the said issue. To start with, we find ourselves unable to do without making a brief account of the procedure governing labour dispute resolution by the CMA. The CMA is vested with jurisdiction to resolve disputes by way of mediation and arbitration through the mediators and arbitrators who are generally appointed by the CMA under section 19 of the Labour Institutions Act CAP 300 R.E.2019 ("the LIA"). To deal with a dispute, the respective officers must have been specifically appointed thereof in terms of section 86 (3) (a) of ELRA for a mediator and section 88 (2) (a) thereof for an arbitrator.

Before a referral goes for arbitration, it must first undergo compulsory mediation. Where the dispute is, like in the instant case, of right, the mediation process has to be completed within 30 days from the date of referral or any longer period as the parties may

mutually agree. Where the mediation fails because of the absence of either of the parties, section 87(3) of the ELRA, whose interpretation is the theme of this case, provides for the consequences in the following words:

> *"(3) In respect of complaint referred under this Act, the mediator may-*
> *(a) dismiss the complaint if the party who referred the complaint fails to attend a mediation hearing.*
> *(b) decide the complaint if the other party to the complaint fails to attend a mediation hearing."*

For the appellant it is submitted that, since the power of mediators is naturally limited into assisting the parties to resolve the dispute amicably, the words to decide the complaint should not be construed literally as that would lead to absurdity. Truly, under the ELRA the jurisdiction of a mediator as the title dictates, is to mediate, the process which does not include to dismiss and to decide a complaint. That would no doubt be a general rule. Under exceptional circumstances as it is in the provision under discussion, the mediator is empowered to dismiss the complaint if the referring party fails to appear and decide the same if the party against whom the referral is made fails to appear.

The jurisdiction to dismiss the complaint, it would appear, though cannot be said to be a direct result of the mediation process, has not been doubted definitely because in the context of the provisions under discussion, it entails a summary order which is made without hearing. The debate here is on the jurisdiction to decide the complaint which in its natural meaning would mean deciding the dispute on merit. It does not matter whether the decision is in the form a summary decision (decision on default) or a decision preceded by evidence taking as it was in the instant case.

Let us start by making a precaution that, the duty of the judicature is not to legislate but to give effect to the meaning of a statute. Therefore, if the words of the statute are plain and unambiguous and admit only one meaning, there is no need for construction. See for instance, **the Board of Trustees of the National Social Security Funds v. the New Kilimanjaro Bazaar Limited,** Civil Appeal No. 16 of 2004 and **Dongote Industries Ltd Tanzania v. Warnercom (T) Limited,** Civil Appeal No. 13 of 2021 (both unreported). However, in deciding whether the words of a particular provision in a statute admit only one meaning, it is not

enough, in our view, to look at the said provision in isolation. It has to be looked in the context of the enactment as a whole. Thus, where there is, like in the instant case, a doubt about the meaning of the words of a statute, the same should be construed in such a way that it is not contradictory to the subject of the enactment and the object which the legislature had in view. (See, for instance, our decision in **Joseph Warioba v. Stephen Wasira and another** [1997] TLR 272).

Perhaps, the question which requires a careful consideration is what does it mean by the phrase "to decide the complaint". In the judgment under scrutiny, conceivably using the literal rule, the same was taken to mean arbitrating the dispute. This was not without reasons. It was presumably in the mind of the Labour Court Judge that, to construe the same otherwise would render the provision of section 87(4) which treats such decision binding and enforceable by the Labour Court superfluous. We shall revert to this argument elsewhere in this Judgment.

In our considered view, the phrase to decide the complaint should in the circumstance, be understood in two perspectives

namely; the effect of the default itself and the extent of the power of the mediator to give the effect force of law. On the first standpoint, we have no doubt that; since mediation under the ELRA is compulsory just as it is for arbitration and that, it constitutes an integral part of CMA dispute settlement process, unreasonable failure to appear during each of the two stages leads to a similar inference that the party in default is not serious to prosecute or defend the claim. Thus, unless there being justification for the default, dismissal of a suit or decision of the merit of the same in his or her absence is a natural foreseeable consequence as correctly in our view held by the Labour Court Judge.

The question in the second angle is whether under the provisions in question the mediator can arbitrate the dispute and if no, what can the mediator do so as to give the meaning of the said provision effect. We are preparing ourselves to answer the main question negatively for a number of reasons.

First, arbitration is a process which comes after the dispute has been referred to arbitration under section 86(2) of the ELRA and has to be conducted by an arbitrator specifically appointed for the respective referral, save in combined mediation and arbitration

procedure wherein by the consent of the parties, one officer can be appointed as both a mediator and arbitrator.

Second, under the provisions of section 86 and 87 of the ELRA, the role of a mediator is, as rightly submitted for the appellant, to assist the parties to reach amicable settlement of the dispute. In view of his role, the mediator is in a position to receive factual information from the parties that would not ordinarily be made available in the arbitration phase. Besides, the mediation process may involve sel-evaluation of weaknesses in the merits of the case which no doubt may be highly influential to a mediator who subsequently assume the role of an arbitrator.

Under rule 8 of G.N. No. 67 of 2007, the use of information disclosed during mediation process in the arbitration process or any other proceedings is strictly restricted under the rule of confidentiality. This rule is obviously compromised when the same mediator turns into an arbitrator and pronounce an arbitral award in favor of one of the adverse parties. We agree with the position of the Labour Court in **Azizi Ally Aidha Adam v. Chai Bora Ltd,** Labour Revision No. 4 of

2011, High Court Labour Division (unreported) that, this kind of practice leads to a breach of the rule against bias.

Third, the action for unfair termination of service which constitutes most of the complaints referred to the CMA, including the one at issue, is enforceable under section 40(1) of the ELRA which provides as follows:

> *"40-(1) If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer-*
>
> *(a) To reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or*
>
> *(b) To re-engage the employee on any terms that the arbitrator or Court may decide; or*
>
> *(c) To pay compensation to the employee of not less than twelve months' remuneration".*

From the above provisions, it appears to be clear to us that, the jurisdiction to pronounce an award for unfair termination of service is exclusively conferred to the arbitrator and the Labour Court. Neither

the CMA as an institution nor a mediator as a quasi-judicial officer is mentioned. We think, interpretation of the provision in question to mean that the mediator may arbitrate and award the reliefs created by the above provisions as he did, would amount to creating jurisdiction to the mediator which is implicitly excluded under the above provision.

At this juncture, it may be pertinent to observe that, while in the provision under discussion the phrase used is "to decide the complaint", in terms of rule 28(1) of G.N. No. 67 OF 2007 which deals with default to appear during arbitration, the phrase used is "may proceed in the absence of the party" and the procedure on how to proceed is clearly stated which is not the case in the former. For clarity we shall reproduce the respective provisions as hereunder:

> "*28(1) When a party fails to attend an arbitration hearing, an Arbitrator may do the following-*
>
> *(a) where a party fails to attend an arbitration hearing, an Arbitrator may dismiss the matter or postpone the hearing.*
> *(b) Where a party against whom relief is sought fails to attend, the Arbitrator may proceed in the absence of the party or postpone the hearing.*

(2) Where an Arbitrator proceeds in the absence of a party, the party present has to prove its case and to present opening statement evidence, and any argument in support of its case".

As that is not enough, what is pronounced after the matter proceeds in the absence of the party during arbitration is called an award while that what is pronounced during mediation is, according to section 87(4) of the ELRA, called a decision. We think, the use of different terms in the incidences in default was not accidental. It was in the minds of the lawmakers that, the mediators do not enjoy arbitral jurisdiction.

In our opinion, therefore, the phrase " to decide the complaint" used in the provisions in question does not mean to arbitrate.

The obvious question which follows is what does it mean by the phrase "to decide the complaint" in the context of the ELRA and its rules? . We were advised by the counsel for the appellant to seek inspiration in the decision of the Labour Appeal Court of South Africa in ***Premier Gauteng*** *(supra)* and construe the phrase to mean to declare that mediation has failed. Much could have been said. We have taken time to familiarize ourselves with the decision. Much as we may

subscribe to the principle in the said decision that the provisions of a subsidiary legislation must be construed as far as possible so as to reconcile them with the parliamentary enactment, we find the principle deducted from the construction of the said provisions of the law inapplicable in the fact at issue for the reason as hereunder stated.

The opinions of the Labour Appeal Court of South Africa in the above authority in essence was that, as the bargaining council has no jurisdiction under section 191(4) and (5) of the Labour Relations Act, Act No. 66 of 1995 to dismiss a dispute for failure to attend mediation, it was wrong for the same to make use of the provisions of rule 13(2) of the CCMA Rules to dismiss the complaint on merit. If we can reproduce part of the relevant remarks at page 6 paragraph 10 of the judgment, the Labour Court of South Africa observed as follows:

> *"Indeed, the Act does not anywhere confer on CCMA or a bargaining council power to dismiss an employee's referral of a dismissal dispute simply because he failed to attend the conciliation meeting. If there is such a power, it certainly is not in the Act. And the CCMA is a creature of statute that, generally speaking, derives its powers from the Act. Of course, it can also derive some powers from its rules governing the dispute resolution process that it is empowered*

to undertake. Needless to say, its rules should not be in conflict or inconsistent with the provisions of the Act. Where they are, the Act will obviously prevail and such rules would be ultra vires".

The position in Tanzania and South Africa in that aspect is quite different. Unlike in South Africa, in Tanzania the effect of failure to appear during mediation is provided both in the parliamentary enactment and the rules. We would make a similar comment on the position in Kenya which, as revealed in **D. Manji Construction Limited** *(supra),* is based on the provisions of direction number 9 of the Practice Direction on Mediation which is quite different from the provision under discussion.

We cannot as well resort to the provisions of the CPC while we have a parliamentary enactment at hand dealing specifically with labour dispute. The provisions of the CPC would perhaps come into use if there was any *lacunae* in the ELRA and its rules which is not the case. We would make a similar comment on the proposal to make use of the procedure employed in the High Court (Commercial Division) which is in all four with that under the CPC. We admit however that, for the purpose of having uniformity in civil litigations and separating

the arbitration and mediation functions, the said procedure would be much better and we would strongly so recommend to the lawmakers.

What should then be construed to be the scope of the application of the provision by the mediator? In our view, since the phrase to decide used in the respective provision is broader enough to capture an order to proceed *ex parte* which does not by itself amount to arbitration, we would construe the power under the respective provision as limited into making such an order and refer the complaint to arbitration under rule 20(2) of the G.N. No. 67 of 2007. We have also considered that making a finding that, the arbitration should proceed *ex parte* forms part of the decision process.

We would, in view of the foregoing, allow the appeal and direct as such. Nevertheless, there is another jurisdictional concern raised by the appellant in relation to this issue which may affect what should be the way forward. In his submissions, Mr. Kamala questioned the propriety of the exercise of the jurisdiction by the mediator under the above provision on account that, it was pursued after the lapse of the statutory time limit. There is merits on this submissions.

The power of the mediator to mediate a dispute is conferred by section 86(3) and (4) of the ELRA which provides as follows:

> *"(3) On receipt of the referral made under subsection (1) the Commission shall-*
>
> *(a) appoint a mediator to mediate the dispute;*
>
> *(b) decide the time, date and place of the mediation hearing;*
>
> *(c) advise the parties to the dispute of the details stipulated in paragraphs (a) and (b).*
>
> *(4) Subject to the provisions of section 87, the mediator shall resolve the dispute within thirty days of the referral or any longer period to which the parties agree in writing."*

It is clear from the above provision that, unless the parties agree in writing to extend the period of mediation for a much longer period, the mediation has to be completed within a period of thirty days from the date of referral. We understand it to mean that, in the absence of such written consent by the parties, the pre-arbitration jurisdiction of the mediator expires after lapse of such period and the complainant acquires the right under section 87 (7) of the ELRA to have his dispute referred to arbitration or adjudication, as the case may be. In this

matter, there is nothing on the record to suggest that such a written consent was entered into between the parties. In the circumstance, the mediator ought to have marked the mediation failed after the expiry of the statutory period of 30 days and refer the matter to arbitration.

We are aware that in terms of section 86 (8) of the ELRA, the mediator remains "seized with the dispute until the dispute is settled". This does not mean, in our view that, the parties remain bound with compulsory mediation. It means that, should the parties agree to go back to mediation during the pendency of arbitration or adjudication ; or during strike or lock-out, the mediator remains so qualified without further reappointment.

In view of the foregoing therefore, the mediator in proceeding with mediation after lapse of the statutory time without there being a written consent from the parties, committed a fatal irregularity which rendered all the proceedings subsequent to the expiry of the 30 days including the *ex parte* hearing and the decision thereof null and void.

In the circumstance and for the reasons as afore stated, we allow the appeal on account of the first and second grounds. We consequently, nullify and set aside the decision, judgment and proceedings of both the CMA and the Labour Court. We remit the file to the CMA for necessary orders having considered the circumstances of this case. We find it unworthy to consider the remaining grounds.

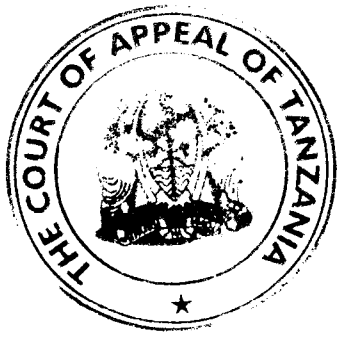
DATED at **DAR ES SALAAM** this 11th day of April, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The judgment delivered this 12th day of April, 2022 in the absence of the applicant who was duly notified and in the presence of Mr. Abas Cothema, Husband of the respondent respectively, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL