IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

IN THE MATTER OF

LABOUR REVISION NO 24 OF 2007

TANZANIA BREWERIES LTD... APPLICANT

VS.

CHARLES MALABONA...RESPONDENT

(Original CMA/MZ/FLMC/201/2007)

CONSOLIDATED WITH:

LABOUR REVISON NO 219/2008

TANZANIA BREWERIES LTD....APPLICANT

VS.

HENRY KILAGULA...APPLICANT

(Original CMA/MZ/576/2007)

CONSOLIDATED RULING

BOTH 30/9/2009 & 22/3/2010

R.M. RWEYEMAMU, J:,

The two applications were heard differently but have been consolidated on the court's own motion for purpose of this ruling. The reason for consolidation is that the two involve the same

applicant/employer, who seeks revision of the *Commission for Mediation and Arbitration* (CMA) award on a variety of grounds of which one is similar in both applications. After going through the CMA record of proceedings and considering the parties submissions in each application, I found; that the decision on that one issue would be the same, and that the said decision is sufficient to dispose of the applications making it unnecessary to decide the rest of the grounds.

To put the issue in each application in a proper context, I will give pertinent facts of each, beginning with **Revision 24/2007.** In that application, the respondent's employment was terminated on 3/7/2007 by the applicant. On 22/7/2007, the applicant appealed that decision to the CMA. The basis of complaint was that his termination was in accordance with procedures of the repealed laws. On 4/12/2007 the CMA delivered its decision and award subject matter of the present application. One of the grounds for the revision application was that:

> "4. That the arbitrator is biased as he was the one who chaired the mediation proceedings and when it collapsed he assumed the role of Arbitrator:"

In the counter affidavit, the respondent deponed that:

"5. As regards paragraph 4 of the affidavit I swear and state that the award pronounced was proper on accounts that the mediation and arbitration proceedings can be combined and presided over by a single person"

I have checked the CMA record. Both mediation and arbitration were conducted by one person and there is no indication of appointment to act in that capacity, or to show that the parties were given a choice in the matter of the mediator proceeding to arbitrate the dispute.

Submission by counsel for the respondent that both functions can be carried on by one person is true, but that practice known as *Combined Mediation and Arbitration* (**Med/Arb**), has its own procedures prescribed under *Rule 18 of the Labour Institutions (Mediation and Arbitration) Rules, GN 64/2007.* Where **Med/Arb** is adopted, the record is supposed to indicate that the hearing proceeds as such. That was not the position in this case. It is worth a mention that the **Med/Arb** system is not without application problems, some were pointed to by Mandia J., as he then was, in the case **BIDCO OIL SOAP Vs. ABDU SAID AND 3 OTHERS,** *Revision 11/2008.* The Hon. Judge's discussion on that issue will be returned to later on in this ruling. For now, it suffices to state

that I find the submission by the applicant that, the CMA did not separate mediation and arbitration proceedings to be correct.

In **Revision 219/2008** the CMA award sought to be revised was issued on 26/9/2008. It was issued pursuant to the complaint made by the respondent/employee to the CMA on 5/12/2007 against termination of his employment by the employer on 25/10/2007. The respondents found the termination procedurally and substantively unfair and sought an order of reinstatement. In the impugned award, the CMA found termination both substantively and procedurally unfair. The ground of complaint found to be similar to the one above was put as follows:

> *"4(v). The Commission did not separate mediation and arbitration and failed to issue a certificate for failure of mediation as required which vitiates arbitration proceedings."*

The respondent denied the above generally and required strict proof of the issue.

Again, I checked the record of proceedings in question and it indicates the following: On 5/2/2007 a ruling was delivered granting the respondent's application for hearing a referral filed out of time. The ruling was issued by one Mr. Samuel as

mediator. Thereafter, Proceedings of 3/6/2008 indicate to have been before arbitrator Hon. Sheila, but the order at the end indicates that the matter was for mediation. That order reads and I quote;" *Mediation imeshindikana chini ya kifungu 88(6) hata baada ya kuongea nao hivyo tutaendelea na Arbitration---naamuru kesi hii iendelee kusikilizwa kwa muda na mahali uliopangwa chini ya kifungu Na 88 (4) (a) (5) cha Sheria ya ajira..."*

Thereafter, arbitration proceeded on 12/6/2008 before that same person who was the mediator of the substantive dispute. There is no indication of appointment to act in that capacity or to show that the parties were given a choice in the matter of the mediator proceeding to arbitrate the dispute. In this case too, I find the submission by the applicant that the CMA did not separate mediation and arbitration proceedings to be correct.

The issue in question in both applications; namely whether a mediator can proceed to arbitrate a dispute after mediation fails without a specific appointment or the parties being given a choice in the matter has been subject of many revision applications. The stand taken by this court is that **where a mediator proceeds with arbitration of a dispute without appointment or giving choice to the parties in the matter, subsequent proceedings will be found to be irregular and reviewable.**

To discuss development of that principle, I find it time saving to quote extensively from this court's decision in **Bulyanhulu Gold mine LTD Vs. James Bichuka**, *Revision 313/2008.* In that case, after discussing the facts the court went on to state:

> *"Based on the above, the applicant prays for a decision on the factual and legal issue of;* "whether there was a fresh appointment for the mediator to act as arbitrator in the same proceedings" *At the hearing, the applicant was represented by Mr. Yusuf Advocate while the respondent appeared in person.*
>
> *Substantiating the issue, Mr. Yusuf submitted that the law, Section 88(2) (a) of the Employment and Labour Relations Act, 6/2004 (the Act); requires that an arbitrator has to be appointed; that such appointment has to be on record and a certificate to that effect issued, otherwise the arbitrator has no powers to act and proceedings conducted without such appointment are void. As authority for such proposition, Counsel referred the court to its decision by Mandia J., as he then was, in* ***GM Mufindi Paper Mills Vs. Masoya Magoti****, Revision 7/2007.*
>
> *In his counter affidavit, the respondent contradicted the applicant and required strict proof of the allegation and submitted at the hearing that;* "regarding the issue of mediator/arbitrator, my response is as per my counter affidavit. I believe the arbitrator recorded what transpired"
>
> *I have checked the CMA record. It reveals that the dispute was before Mr Katindi as mediator on 27/8/2007 when an order was made to the effect that;* "Mediation has failed. Both parties have agreed the dispute be referred for arbitration". *The next date was 17/9/2007 when the dispute came before MR. Katindi as arbitrator, but arbitration was adjourned by consent of the parties to*

another date. Ultimately, arbitration was conducted by the same person and an award issued by him on 6/10/2008. On those facts, it is clear the issue of appointment of the arbitrator was not on record as submitted by counsel for the applicant and contradicted by the respondent.

I have had opportunity to read the cited decision of ***Masoya Magoti*** *which is persuasive. My understanding of the holding of that case Is that the Hon. Judge discussed the import of section 88 (2) (a), (b) and (c) of the Act, which provide that where mediation fails:*

1. *The mediator must issue a certificate as spelled out in Rule 16(1) of the Labour Institutions (Mediation and Arbitration) rules GN 64/2007(the Rules) then the Commission(CMA); thereafter,*
2. *The CMA must appoint an arbitrator to decide the dispute, and it must,*
3. *determine the time date and place of arbitration proceedings, and;*
4. *advise the parties to the dispute of the details stipulated in 2 and 3 above.*

The Hon. Judge underscored two points. First he explained the role of mediators under the Act, and the duty to issue a certificate at the end of the process if mediation fails. Second, he emphasized that where the parties choose arbitration, the CMA ***must appoint an arbitrator*** *who must decide the case and issue an award. The issue of procedures to be followed for such appointment however, was not discussed; neither did the Hon. Judge specifically state it as a principle of law that without such appointment, the subsequent proceedings are void.*

This court must now make a specific finding because the issue of appointment of arbitrators before they conduct each particular arbitration; and connected with it, the issue of mediators automatically converting into arbitrators after failure of mediation has been raised as a ground for revision in a number of applications before and now pending in court.

Admittedly, a decision of the issue causes me great anxiety. Why? *For one, my decision will impact a number of disputes already filed in this court.*

While under the Act, mediation and arbitration are two distinct functions; mediators are appointed under section 86(3) (a) and arbitrators under section 88(2) (a); and while it is true the Act provides that the CMA ***must appoint an arbitrator,*** *the Act, read together with the Rules and the Labour Institutions (Mediation and Arbitration) Guidelines, GN 67/2007* ***however, do not specifically provide for the procedure for such appointment.***

I take judicial notice of the fact that officers of the CMA are appointed as both mediator/arbitrator and the current practice has been that after mediation fails and a certificate is issued, often the same person proceeds with arbitration if the parties choose to have the dispute arbitrated. Yet that practice, understandably born out of necessity is both contrary to law as stated above, and may compromise efficient operation of system.

I state that the practice is born out of necessity because: I also take judicial notice of the fact that the CMA suffers from human resource constraints. Some area offices established under section 15 (1) (c) of the Labour Institutions Act, 7/2004, are manned by one person acting as both mediator and arbitrator. This is a serious challenge.

For one, the resultant practice is contrary to law and the confidentiality prescribed under Rule 17 of the M&A rules remains but on paper. That rule provide that; ***"no person may refer to anything said at mediation proceedings during any subsequent proceedings, unless the parties agree in writing".*** *The said provision aims at preserving the confidentiality of the mediation process- which is a cornerstone for success of mediation as an effective avenue for quick resolution of labour disputes.*

Generally, mediation system best works when parties have full trust in confidentiality of the proceedings which enables them to participate with frankness. Further when the same person acts as mediator and arbitrator as happened in this case, there would be a conflict of roles likely to lead to injustice. The adopted practice therefore inherently deprives the CMA of a very effective tool for fast dispute resolution."

Before continuing, I wish to stress a point regarding the role of mediation not discussed in that case. In essence mediation is also an important tool in maintaining sound labour relations. It is a stage, albeit a formal one above negotiations/consultations where the parties settle disputes between each other amicably- which leaves their working relationship unscarred. Under mediation, the voluntary/amicable aspect of dispute resolution is maintained, only it is achieved with aid of a neutral third party.

Mediation is made compulsory under the Act in order to achieve a policy objective of promoting the spirit of amicable settlement of industrial conflicts, vital for economic efficiency and productivity. Under the Act mediation has added advantage in that it is conducted with aid of a neutral but qualified person in labour laws and practice. The point stressed is that mediation, apart from enabling quick settlement of labour disputes, plays such a vital role in maintaining good labour relations, the

importance of which need no further discussion. In view of that, the CMA should be empowered by the powers that be, in terms of having adequate resources to enable it achieve the ideal situation where mediation and arbitration will be carried out by two different persons in any dispute. That observed, I return to the task of examining development of the practice rule developed in the case of **James Bichuka.**

*"Granted, there are disputes where from their very nature, the same person may perform both functions-the kind of scenario envisaged under the combined mediation and arbitration (**Med/Arb**) provisions. A different procedure is prescribed for the **Med/Arb,** for which a different procedure of appointment is required as prescribed under Rule 18 of the **M&A rules.** **That system is itself not without** practical difficulties as discussed by Mandia J., as he then was, in the **BIDCO** case referred to above when he observed that:*

> *"Rule 18 of GN 64/2007 provided for combined Mediation and Arbitration proceedings, but in my view this rule does not override the provision of Rule 16 with regard to issuing a certificate where mediation has failed.*
>
> *The Commission has the power under Rule 18 of GN 64/2007 to order for combined mediation/arbitration proceedings after giving due notice under Rule 18 (2). **How this can be done is a moot point,** since the parent Act i.e the Employment and Labour Relations Act prescribes for the appointment of a mediator of a dispute first under Section 86 (3) (a) and, after the failure of mediation, appoint an arbitrator under Section 88 (2) (a). Appointing one as both a mediator and arbitrator*

at the same time depends on how efficient the mediator is in finalizing the mediation, writing the certificate and receiving the appointment of arbitrator. Since mediation of disputes is mandatory, and arbitration is also mandatory, it remains to be seen how the two appointments can be made at the same time without flouting the law. (Emphasis mine)

Be that as it may, until necessary enabling provisions are made and the CMA equipped to effectively and efficiently carry out its important functions by being able to assign two different persons to perform the two functions in each case, the reality on the ground remains as explained and the CMA has to adopt a compromise practice which is not directly contrary to law and does not precipitate injustice to either party.

As already observed, currently most of its officers are appointed as both mediator and arbitrator. To avoid nullification, the next best proper practice, which fortunately some arbitrators are already using, is to inform the parties (and record their responses); that he/she is the appointed arbitrator. Where the parties feel that the previous role as the mediator will adversely affect their interest, they will state so, and in case of that eventuality, the dispute has to be arbitrated by someone else, even if that person has to come from a different area office-with attending costs and delays. ***In the present situation, where a mediator proceeds with arbitration of a dispute without appointment or complying with the above procedure,*** *(that is, giving parties a choice in the matter)* ***subsequent proceedings will be found to have been conducted with fundamental irregularity and reviewable....."***

To make the practice more clear, I should add a point not stated in **James Bichuka"** that the CMA should therefore adopt a practice which will avoid future disputes over the issue of 'parties'

choice' in the matter' i.e. consent for the mediator to proceed in arbitration, by having parties in such disputes sign a consent agreement in the manner already prescribed for procedures where **Med/Arb** is adopted - see Rule 30 of the Guidelines, GN 67/2007. Such signed consent agreement must be clearly indicated in the record before arbitration proceeds.

To return to the two applications subject matter of this ruling, I similarly find that the persons who mediated the disputes proceeded with arbitration without any indication that they were the appointed arbitrators or that parties were given a choice in the matter; and therefore that in each case the arbitrator exercised jurisdiction with material irregularity. For that reason, in both applications, the CMA proceedings including the award and subsequent orders are hereby quashed. The CMA files are to be remitted with orders that it conducts the process afresh according to law. For avoidance of doubt, at the CMA, the two proceedings are to be conducted differently. It is so ordered.

R M Rweyemamu
JUDGE
18/3/2010

Date: 22/03/2010

Coram: Hon. R.M. Rweyemamu, J.

Applicant:

For Applicant: Mbwambo a Legal Officer for the company.

Respondent:

For Respondent: Mutalemwa Advocate for.

C.C. Josephine Mbasha

COURT: This matter is coming for Ruling. Ruling in this case has been consolidated with the ruling in application 219/2008.

ORDER: Ruling delivered this 22nd March, 2010 before parties as above R/A Explained.

R.M. Rweyemamu

JUDGE

22/3/2010