IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LABOUR DIVISION

AT DAR ES SALAAM

MISCELLENOUS LABOUR APPLICATION NO. 20 OF 2014

BETWEEN

CELESTINE SAMORA MANACE & 12 OTHERS.....APPLICANTS

VERSUS

TASAF..... 1st RESPONDENT

THE ATTORNEY GENERAL.....2nd RESPONDENT

RULING

15/5/2015 & 24/07/2015

Mipawa, J.

This is a ruling in respect of the Preliminary Objections filed and raised by the respondents, Tasaf,[1] and the Attorney General through the Attorney General's Chambers. The filed Preliminary Objections were against the application filed by the applicants' application into which they had sought a declaratory order and/or Injunction that the employment dispute between them and the respondents be referred to a single Arbitrator of the parties' choice and not to the Commission for Mediation and Arbitration.

The raised grounds for the preliminary objections are:-

1. *That the application is hopelessly time barred.*

[1] Tasaf refers to Tanzania Social Action Fund

2. *That the application is incompetent and bad in law for being accompanied by a defective Affidavit....that the affidavit contains legal arguments.....the affidavit contains prayers.*
3. *The application is bad in law for contravening Rule 24 (2) (e) and (f) of the Labour Court Rules, 2007.*

The hearing of the Preliminary Objections went on ***viva voce*** (by live voice) into which the applicants were represented by Senior Learned Counsel Mr. Rweyemamu whereas the respondents were represented by the office of the Attorney General Chamber at Dar Es Salaam into which Mr. Changa State Attorney appeared.

Arguing for the first preliminary objection the respondents submitted that the application was filed out of time because they were terminated by Tasaf in December 2011 and did not take any action till this time when they need the dispute to be referred to the single Arbitrator. He also argued that there is no specific rule cited by the applicants for such an application. That, even though the rules do not provide for such time limit, the law of limitation to its first schedule speak of sixty days time limit. He prayed for the application to be dismissed.

On the second ground of the preliminary objection the respondents submitted that the affidavit contained legal issues and prayers contrary to the law. He directed this Court to the famous case of Ex parte Matovu,[2] which spoke of the legal fact that affidavit should not contain legal issues

[2] Uganda V. Commissioner of Prison Ex Parte Matovu,(1966) EA

hence making the affidavit defective. And that since the applicants were represented by a very Senior Advocate then the application should be dismissed.

In response Mr. Rweyemamu, Learned Senior Counsel submitted that as per Mukisa Biscuit Manufactures case,[3] that the preliminary objection should constitute the point of law and no mixed point of law and facts which need to be ascertained. That time limit is not a pure point of law rather a mixer of law and a fact as the same will make the Court to embark on endless facts and inquiry in respect of accruing facts to all of the applicants. It is on one part point of law and on the other side a point of law hence a mixed facts and law.

Mr. Rweyemamu insisted that the affidavit in support of the application is clear at paragraph 14, 6 and 8 on the issue of time and that they filed the matter so as it goes to the single arbitrator and not a dispute of unfair termination.

On whether the application was properly made to this Court, Mr. Rweyemamu submitted jointly that the application was made with the chamber summons under rule 24 (3) and (11) of the Labour Court Rules GN. 106/2007 and that the same rules require an affidavit to contain legal arguments and prayers and the same is used interchangeably hence not fatal.

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[3] Mukisa Bickuit Manufactures Vs West Distributors Ltd 1969, EA at p d to e

On form 2, Mr. Rweyemamu argued that the application had complied with the requirement of rule 24 (2) as there are annexures thereto as in the affidavit, and that no substantial prejudice to the applicants or the respondents, he therefore prayed for the preliminary objection to be dismissed with costs as per rule 51 as well as the Counter affidavit ***inter alia*** that the one who verified the information is not mentioned.

In rejoinder, Mr. Changa for the respondents rejected that the preliminary objection on time limit was pre mature as the issue in Court was on fairness of termination and that the inquiry was on when they were terminated and not when they were employed. That the preliminary objection was valid because from when they were terminated be it 10/09/2013 till 20/02/2014 the same was out of time.

On the affidavit, Mr. Changa argued that the rules speak of legal issues and not legal arguments hence defective. He insisted that the Counter Affidavit had complied to the law and the preliminary objections be reacted upon that application be dismissed.

After going through the file records and the raised preliminary objections of the parties' in ***ex-abandunt cautela*** [with extreme eye of caution], on the issue of time limit this Court finds it to be true that as per the applicant's affidavit, there was an agreement between the parties that should there arise any dispute the matter be referred to the single

arbitrator,[4] and there has been communications between the parties on resolving the issue till when the respondents decided that the matter be referred to the Commission of Mediation and Arbitration.[5] And as rightly pointed out by Counsel for the applicants the application is not for unfair termination but to get an order to refer the matter to a single arbitrator as per the agreement reached between the applicants and the first respondent hence the matter is not time barred. Therefore the first preliminary objection is dismissed.

On the second preliminary objection the affidavit in support of the application contains legal arguments and prayers is also not tenable because the Labour Court Rules which govern procedural aspects of the applications before this Court provide for the same, whether legal issues are different form legal arguments that needs a ***semantic exercise*** thereto. The second preliminary objection is dismissed too.

But this Court *suo motu* noted defects in the application which hinders the hearing of the application, namely:-

1. *Non citation of the enabling provisions of the law.*

   The applicants sought for a declaratory order and/or injunction from this Court to refer the matter to a single arbitrator, and is made by a chamber summons under rule 24 (3) and (11) (c) of the Labour Court Rules GN 106/2007; a notice of application made under rule 24 (2) of the Labour Court Rules GN. 106/2007.

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[4] See applicants' affidavit in support of the application
[5] *ibid*

The non cited provisions of the laws are rule 24 (1) of the Labour Court Rules,[6] and section 94 (1) (f) (i) and (ii) of the Employment and Labour Relations Act No. 6/2004.

Non-citation and wrong citation of the law, makes the application incompetent before the Court and the remedy is the same to be struck out from its roots. To cushion that above, it is prudent to make a legal venture and follow the footsteps in various decisions on that issue.

The Court of Appeal of Tanzania, being the highest Court of our Soil has always ceaselessly given out a couple of decisions on the same, ***inter alia*** (among others) the **China Henan International Cooperation Group V. Salvand K.A. Rwegasira[7],** where the CAT stressed that:-.....

> *...The role of rules of procedure in the administration of justice is fundamental. As stated by Collins M. R. in* ***Re Coles and Ravenshear*** *(1907) 1 KB 1 rules of procedure are intended to be that of handmaids rather than mistresses. That is, their function is to facilitate the administration of justice. Here, the omission in citing the proper provision of the rule relating to a reference and worse still the error in citing a wrong and inapplicable rule in support of the application is not in our view, a technicality falling within the scope and purview of Article 107A (2) (e) of the constitution. It is*

[6] That provision speak of any application to the Court to be made by a notice of application.
[7] Civil Reference No 22/2005 CAT at DSM, Before Ramadhani, Lubuva, Mroso, JJA, delivered on 21/06/2006

a matter which goes to the very root of the matter as urged by Mr. Kamugisha. We reject his contention that the error was technical.....All in all therefore, for the foregoing reasons, the preliminary objection is sustained. Consequently, the application being incompetent is struck out with costs...[8]

Also in the case of **Anthony Tesha V. Anita Tesha, quoted in Robert Leskar V. Shibesh Abebe**[9] the CAT held that:-

...The mere citation of a section without indicating the sub-section and paragraphs is tantamount to non-citation and renders the application incompetent...[10]

In conjunction to the above cases is also the case of the **Project Manager Es-Ko International Inc. Kigoma V. Vicent J. Ndugumbi,** the CAT had a holding that:-

...It is now settled law that wrong citation of the law, section, sub-section and/or paragraph of the law or non-citation will not move the Court to do what it is being asked to do and accordingly the application is incompetent...[11]

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[8] *op.cit* note 10 at p.10.
[9] AR Civil Appl. No. 4 of 2006 CAT (unreported)
[10] *Op.cit note 9.*
[11] Civil Application No. 22 of 2009 at Tabora, per Rutakangwa, J.A.

Despite the above CAT cases, this Court in the case of **The Guardian Ltd. V. Axaud Temba**[12], in which the same defects were noted, fully explained and the application was ordered struck out.

Suffice to say the above defects, make the present application struck out.

But on the other hand, had raised by Mr. Rweyemamu Senior Learned, that the Counter affidavit filed by the respondents is incurably defective, as it possesses a Verification clause with no name of the person who verified the information. The Verification Clause must possess the name of the one who verifies the information[13]. Lack of a name of the person verifying the information in the verification clause, chills the whole affidavit/Counter affidavit, hence the Counter affidavit of the respondents of one Paul G. Shaidi is also incurably defective and also ordered struck out.

For emphasis, the application is struck out not by the reasons advanced by the respondents but those noted by this Court as explained above, as well as the Counter affidavit of the respondents as righty noted by Mr. Rweyemamu, Senior Learned Counsel.

Following the legal issue embodied in this application which carries a newly legal concept on the building of jurisprudence of labour matters, and for meeting the good ends of justice between the parties, this Court using

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[12] Rev. No. 25 of 2014, at HCLD (unreported) delivered on 26/02/2015

[13] B.M. Gandhi, *Legal Language, Legal Writing & General English*,(2011)at p 220.

powers vested in it by the law,[14] the applicants are give a leave of 28 days from today to file a proper application free form incurable procedural errors.

It is so ordered accordingly.

I.S. Mipawa
JUDGE
24/07/2015

Appearance:-

1. Applicant: Senior Advocate Mr. Rweyemamu - Present
2. Respondent: Pauline Mdendeni, State Attorney - Present

Court: Ruling has been read today in the presence of both parties as show in the appearance above.

I.S. Mipawa
JUDGE
24/07/2015

[14] See Rule 55 (2) of the Labour Court Rules Government Notice No. 106/2007

IN THE HIGH COURT OF THE UNITED REPUBLIC

OF TANZANIA LABOUR COURT

AT DAR ES SALAAM

MISCELLANEOUS LABOUR APPLICATION NO. 25 OF 2015

BETWEEN

TANZANIA UNION OF INDUSTRIES AND

COMMERCIAL WORKERS [TUICO]..... APPLICANT

VERSUS

NATIONAL MICROFINANCE BANK.....RESPONDENT

JUDGMENT

02/06/2015 & 24/07/2015

Mipawa, J.

This is an application filed under certificate of urgency by the applicant, namely the Tanzania Union of Industries and Commercial Workers Union[1] as against the Respondent. The National Microfinance Bank[2]. The application has been initiated by the notice of application made under Rule 24 (1) (2) (3) (9) and (11) of the Labour Court Rules[3]. Section 94 (1) (f) (ii) of the Employment and Labour Relations Act[4].

The applicant also filed a chamber summons under Rule 24 (1) (2) (3) and (11) of the Labour Court Rules[5]. Section 94 (1) (f) (ii) of the

[1] Known by its acronym as TUICO Trade Union
[2] Commonly known as NMB PLC
[3] Government Notice No. 106 of 2007 the Rules
[4] Act No. 6 of 2007 Cap 366 R.E. 2009
[5] *op. cit* note 3

Employment and Labour Relations Act[6], supported by an affidavit of one Shikunzi John. The relief sought in the notice of application is that:-

1. *...The Honourable Court may be pleased to issue a temporary court injunction order to restrain the respondent's action to deduct agency shop fee from TUICO union members pending the decision of the Labour Dispute No. CMA/DSM/ILA/INT-27/14[7].*
2. *...Any other relief that this Court may be pleased to grant any order that it considers just and convenient to grant[8].*

The Applicant in his affidavit has narrated and averred that as a trade union which represents workers employed in several sectors of employments including in the respondent's business ie. the National Microfinance Bank where the workers are members, the Applicant further in paragraph 3 and 4 of the affidavit contends that:-

3. *...The Applicant in this matter holds the majority of the employees at NMB thus making it to have **Exclusive Bargaining Agent** for the employees at the respondent **work place**.*
4. *...The Applicant's members here are being deducted **agency shop fee** and being remitted to FIBUCA by the Respondent while knowing that they do not have agency shop fee agreement between the Respondent and FIBUCA and they do not **have majority.***

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[6] *op. cit* note 4

[7] CMA refers to Commission for Mediation and Arbitration established under S. 12 of the Labour Institution Act No. 7 of 2004 DSM and ILA refers to Dar es Salaam and Ilala respectively

[8] The Applicant's notice of application and chamber summons

The applicant concludes in his affidavit that the respondent's act of deducting **agency shop fee** from TUICO members from their salaries is against the law and they request this Honourable Court to issue temporary injunction to refrain (restrain) the Respondent herein to deduct **agency shop fee** from Applicant's members salary pending the decision of the Commission in Labour Dispute No. CMA/DSM/ILA/INT-27/14. Thus in the certificate of urgency the applicant claims:-

> *... There are reasons for urgency and necessity for relief sought because the Respondent is deducting **agency shop fee** from the applicant's members and it makes the applicant's members to be deducted TUICO fees and **agency shop fee** which is remitted to another union which has no majority [at place of work] pending the decision of Labour Dispute No. CMA/DSM/ILA/INT-27/14...*

The respondent through the counter affidavit of one Juma Paul Peter Kadoke controverted the affidavit of the applicant. The Respondent contended in the counter affidavit that; at all material times the trade union with the majority representation is a union known as Financial Industrial Banking Utilities Commercial and Agro Processing Industries Trade Union [FIBUCA]. That FIBUCA followed all required procedures and became the Recognized Union within the meaning of the Employment and Labour Relations Act 2004. FIBUCA signed a Recognition Agreement

between the Respondent herein [NMB] and itself [FIBUCA] on 26/01/2011 which was lodged with the Labour Commissioner[9].

The Respondent also entered into a valid ***agency shop agreement*** [as contended in paragraph 5 of the counter affidavit] with FIBUCA trade union on 1st November, 2011. He argues in para 6 and 7 that:-

> *6 ... At no point in time did the applicant [TUICO] followed any legally recognized procedure with a view to show that it has attained majority representation of the employees...*
>
> *7 ...There is a lawful agreement which justifies deduction of the agency fee. The said agreement had never been challenged successfully ... the law provides for procedures which should be followed for the purpose of a trade union being recognized as a representative of the majority employees within a* ***bargaining unit...***[10]

At the hearing of this application the applicant was represented by M/S Mutembei and Mansoor Ramadhani from TUICO trade union while the respondent enjoyed the services of Mr. Frank Milanzi, Learned Counsel.

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[9] Recognition as exclusive bargaining agent of employees and the procedure thereof is at S. 67 of the Employment and Labour Relations Act No. 6 of 2004 Cap. 366 R.E. 2009

[10] Counter affidavit of the Respondent the National Microfinance Bank as sworn by John Paul Peter Kadoke

Submitting in support of the application ***viva voce*** [by live voice] the representative from TUICO[11] argued that their filed affidavit be considered by this court as part of their submission and she added that there is a trade dispute before the Commission for Mediation and Arbitration which they have filed against the Respondent the National Microfinance Bank in order to decide who has the majority members at place of work between the applicant and the respondent. They are now asking the court to restrain the respondent from deducting urgency shop fees from their members [TUICO members] pending the determination of the dispute they have filed in the Commission.

Mr. Milanzi Learned Counsel on the other hand submitted that the respondent has entered into Recognition Agreement with FIBUCA[12] trade union which they recognize it as having the majority of members and that the agreement was sent to the Commissioner of Labour as the law requires. He argued further that the respondent has also entered into an agreement called agency shop fee agreement which authorizes the respondent to deduct agency shop fee for members and non members and the respondent does it through section 72 (3) (c) and (d) of the Employment and Labour Relations Act[13] [for the purpose of reference it is important to quote the section].

> *72 (3) The requirements for a binding agency shop agreement are:-*
>
> *(a) .....*

[11] TUICO refers to Tanzania Union of Industries and Commercial Workers Union. A trade union
[12] FIBUCA, refers to Finance Industrial Banking utilities Commercial and Agro Processing Industries Trade Union
[13] *op. cit* note 4 Act No. 6 of 2004

(b) .....

(c) Any agency fee deducted from the remuneration of an employee, who is not a member, is equivalent to, or less than the union dues deducted by the employer from the remuneration of a member;

(d) The amount deducted from both members and non-members shall be paid into a separate account administered by the trade union[14]

Mr. Milanzi further submitted that though the applicant has complained that the respondent deducts agency shop fee from TUICO members [or Applicant's Members] but the law, the Employment and Labour Relations Act allows to deduct the agency shop free as per section 72 (4) of the Act [for easy of reference I quote the relevant section]:-

> *72 (4) Notwithstanding the provisions of any law or contract an employer may deduct fee under an agency shop agreement that complies with the provisions of this section from an employee's wages without the consent of that employee...*[15]

The Learned Counsel concluded that the court should dismiss the present application which requires the respondent to be restrained from deducting the agency shop fee because it is devoid of merit and the

[14] *ibid* S. 72 (3) (c) (d)

[15] *ibid* S. 72 (4) The deducted fee under agency shop, money has to be put in a separate account and may only be used to advance or defend the socio economic interest of the employees in that work place S. 72 (3) (e) of Act No. 6 of 2004

applicant does not have the majority members, otherwise they could have followed the procedure which is clear.

In their rejoinder submission the applicant argued that the term **non-members** as it appears in the Act means the employee who has not filled form no. 6 which instruct the employer to deduct membership fees. On the other hand **a member** is the one who has filed form no. 6 of instructing the employer to deduct fees and get the identify card.

The applicant further submitted that, though the respondent say that a non-member is an employee who is not a member of any trade union including those employees who belong to TUICO or who are members of TUICO is not a true meaning of a non-member in their [Applicant's] understanding. Therefore it is wrong for their TUICO members to be deducted an agency shop fees by the Respondent[16].

Now having exposed the submissions of both parties as above and ***in ex-abandunt cautela*** [with eyes of caution or extreme caution] read the affidavit and counter affidavit of the parties the following nagging question have to be answered in determining this application; ***videlis***:-

(i) Whether the Respondent [NMB][17] entered into a Recognition Agreement with a trade union styled FIBUCA[18].

(ii) Whether a Collective agreement commonly known as agency shop fee agreement was entered between the Respondent and

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[16] Submissions of the Applicant and Respondent viva voce affidavit of the applicant and counter affidavit of the Respondent

[17] NMB refers to National Microfinance Bank

[18] *op. cit* note 12

FIBUCA to deduct agency shop fees from non-members and who is a non member (?) or non-members.

(iii) *Whether the deduction of* ***agency fee shop*** *from the wages of the Respondent's employees who are non-members is against the law.*

(iv) *What is the purpose of* ***agency fee shop*** *agreement in the context of Employment and Labour Relations?*

In the course of answering the above issues and for the better understanding of the terms used in this application [and] which they relate to Employment and Labour Relations matters the definition of the terms is a necessary step towards the determination of the application at hand. The following terms will be defined with respect to the issues raised supra; ***idest***:-

(a) *The meaning of Recognition Agreement and its essence.*

(b) *Organizational Rights what are they?*

(c) *Collective Agreement defined:-*

  (i) *Agency shop fee agreement.*

  (ii) *Closed shop fee agreement.*

(d) *A bargaining unit and workplace.*

(e) *The definition of a non-member or non-members.*

I will answer the raised questions/issues ***serriatium***; the first issue is whether the respondent employer entered into a Recognition Agreement with a trade union styled FIBUCA. To answer the first question one has ***in-***

limine (at the outset) need to know the meaning and essence[19] of Recognition Agreement first of all which will ultimately define the term and answer the first issue.

The history of recognition agreement dates back in the 1960s through 1970s in South Africa where the grew of unions representing the interest of black workers was alarming despite the white minority government suppression of the [black workers] unions. Proffessor Annali Basson writes in an article titled "*introduction to collective labour law*"[20] that a response to an increased labour unrest, the white minority rule appointed Professor Wiehaln to form a commission known as Wiehaln Commission whose recommendations were translated into legislation during the 1979 to 1983 respectively. The trade unions representing black employees at last gained access to the institutions created by the Labour Legislation. However the trade union [by black workers] were hesitant to participate in the activities of these institutions [created by Labour Legislation] for mainly two reasons. Prof. Annal Basson[21] Marylyn Christianson[22], Christoph Garbers[23], Prof. PAK le Roux[24], Dr. Calrl Mischke[25] and Dr. Emil Strydon[26].

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[19] Essence: The Central or most important quality of a thing, the real or inner nature of a thing

[20] Prof. Annal Basson et. al Essential Labour Law Volume 2 Collective Labour Law, Labour Law Publications Houghton, third edition 2002 p. 11

[21] Prof. Annal Basson BLC, LLB (Pret) LLD [Unisa] is a Professor in the Department of merchantile law University of South Africa and an Advocate of the High Court. She is a part time Commissioner of the CCMA [South Africa]

[22] Marylyn Christianson BA [UCT] University of Zimbabwe, LLB, LLM [natal] is a senior lecturer at Oliver Schreiner School of Law, University of the wit waters rand

[23] Christopher Garbers BLC, LLB [Pret], B. Comm [Unisa] LLM [stell] is an Attorney of the High Court and Senior Lecturer in Law University of Stellen bosch

[24] Prof. PAK le Roux, Blur, [Rau] LLM [Unisa] LLM [London] is a honorary Professor in Department of merchantile law Unisa Attorney of the High Court Mediator and Arbitrator

[25] Dr. Carl Mischke, BA, LLB [wits] LLM [Heidelberg] LLD [Unisa]

put the reasons as that:-

(a) *The Industrial Councils were not only products of Legislation by a Government known to be oppressive but were also seen as institutions catering for the interest of those employers and trade unions with a prior history of opposition to the interest of black employees.*

(b) *At a practical level many of these newly established trade unions were small with their membership mainly concentrated in* ***individual work place***[27].

The newly formed trade unions were not very strong representatives within the industry as a whole and therefore could not wield significant power at industrial level within an industrial council. Therefore these trade unions preferred **plant level bargaining** as opposed to **industrial level bargaining**. In the 1960s a strong pattern of plant level bargaining as a result developed. The pattern of plant level bargaining has often referred to as the **Recognition Agreements System**. This name arose from the method commonly used by such trade unions to obtain the right to represent employees in the **work place** [in other words at plant level][28].

I have noted n this application that a **recognition agreement** was entered between the respondent employer and FIBUCA a trade union

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[26] Dr. Emil Strydom, BA, LLB [Pret] LLM, LLD [Unisa] is Industrial relations manager at the chamber of mines of South Africa and Attorney of the High Court

[27] *op. cit* note 20 at p. 12

[28] *op. cit* note 20 at p. 12 The recognition agreement procedure requires the fulfillment of two elements 1st recognition of the union as a collective bargaining agent at place of work 2nd the employer extends some organization rights to the union to enable it fulfill its representative function see note 30

[exhibit NMB1]. The respondent counsel had also duly submitted that the employer recognized FIBUCA trade union as having the majority members at place of work. Therefore they [Respondent and FIBUCA] followed the **modus operandi** of the recognition agreement ie. recruiting members in a work place and after it had recruited a significant numbers and felt strong the trade union would approach the employer and demand recognition[29].

According to Professor Annal Basson and other five co-authors[30] the **recognition agreement** had two elements; ***videlis***:-

(a) *The employer recognized the union as the collective bargaining agent of the employees or certain groups of employees working in that work place.*

(b) *The employer extends certain organizational rights to the union for it to be able to fulfill its function as representative of its members and possibly other employees falling in a defined* ***bargaining unit****.*

I entirely and respectfully agree with the above position because it is also enshrined in our labour law which is in parimateria with the labour law of South Africa. Now, the respondents recognition agreement exhibit NMB1 tells that the parties mutually and amicably signed the organizational rights agreement on the 7th day of October, 2009 and that for the purpose of the agreement "***Bargaining Unit*** *means all employees other than*

[29] S, 67 (3) (4) of the Employment and Labour Relations Act 2004 give the modus operandi towards Recognition Agreement

[30] *op. cit* note 21, 22, 23, 24, 25 and 26 about the co-authors of the book *op. cit* note 20

Senior Management Employees". Section 66 of the Employment and Labour Relations Act 2004 defines a bargaining unit as to mean:-

> *66 (i) Any unit of employees in respect of which a registered trade union is recognized or is entitled to be registered as the exclusive bargaining agent in terms of this part.*
>
> *(ii) Includes a unit of employees by more than one employer.*

Therefore it could be said in other words that a bargaining unit is a group of employees usually performing the same type of work, who are grouped together for purpose of collective bargaining.

The organizational rights demanded by the trade union and which the employer extends to the union for it to be able to fulfill its function as representative of its members include one or more of the following:-

(a) *The right of trade union officials to access to the* ***work place*** *to meet with members. [****Section 60 of the Employment and Labour Relations Act No. 6 of 2004***[31]*.*

(b) *Stop order facilities employer agree to deduct trade union membership fees for the wages of employees who were union members and pay these fees directly to the trade union [****section 61 of the Employment and Labour Relations Act No. 6 of 2004****].*

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[31] See Prof. Annal Basson el, al *op. cit* note 20 see also the Employment and Labour Relations Act No. 6 of 2004 Cap 366 RE. 2009 Section 60 - 65

(c) *The right to leave for trade unions activities* ***[Section 63 of the Employment and Labour Relations Act No. 6 of 2004].***

(d) *The right to elect union representative members commonly known or referred to as "shop stewards" [**Section 62 of the Employment and Labour Relations Act No. 6 of 2004**] to perform certain functions in the* ***work place*** [32]*[**underlines mine**].*

Trade union access to the work place for example is an organization rights which is enshrined in the Employment and Labour Relations Act No. 6 of 2004 ***notebien*** in section 60 of the Act, the right as noted above allows or give access to the trade union officials to the work place or in the other words to enter the employer's premises[33]. The term work place has not been defined in the Employment and Labour Relations Act No. 6 of 2004. However a good definition of the term is defined in the Labour Relations Act of South Africa [our labour laws are in parimateria with the labour laws of South Africa] thus:-

> *...**Work place**...means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organization, the*

[32] *ibid* see also the definition of work place in this ruling and the meaning of bargaining unit

[33] The union to enter the employer's premises in order to (a) recruit members (b) communicate with members (c) meet members in dealings with the employer (d) hold meeting's of employee on the premise (e) vote in any ballot under the union constitution [see] S. 60 (i) of Act No. 6 of 2004

place or places where employees work in connection with each independent operation constitutes the work place for that operation[34].

Now in so far as the above noted organization rights are concerned, should the employer agree to all or some of these demands, the agreement concluded would commonly be called **A Recognition Agreement** such as that entered between the respondent and FIBUCA trade union [exhibit NMB1]. The first issue therefore is answered in the affirmative.

The second nagging question is whether a collective agreement commonly known as **agency shop fee** was entered between the Respondent and FIBUCA trade union to deduct agency shop fee from **non-members,** and who are the **non-members**.

The Respondent through his counsel Mr. Milanzi submitted that the Respondent employee also entered into agreement known as agency shop fee with FIBUCA trade union and the agreement authorized the respondent employee to deduct agency shop fee from member and non-member. The applicant does not challenge the fact that the respondent entered with FIBUCA an agency shop fees agreement, he agrees that there is such an agreement but opposes the respondent act of deducting agency fee shop from the applicant's members [TUICO members] who according to the applicant his members do not fall within the meaning on non-members.

[34] Labour Relations Act No. 66 of 1995 [South Africa] section 213

In order to answer properly this issue, the terms collective agreement and agency shop fee must be defined. The Employment and Labour Relations Act No. 6 of 2004 defines collective agreement as **a written agreement concluded by a registered trade union and an employer or registered employers association on any labour matter**[35]. However the Labour Relations Act 1995 of South Africa which is in parimateria with the Employment and Labour Relations Act 2004[36] adds more flavour in the definition of the collective agreement; thus:-

> *...A written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions on the one hand, and the other hand:-*
>
> *(a) One or more employers.*
>
> *(b) One or more registered employers' organizations or*
>
> *(c) One or more employers and one or more registered employers organizations.*

The record clearly shows that the respondent employer apart from entering into Recognition Agreement with FIBUCA trade union entered also into an agency shop fee agreement with the trade union as pointed out by Mr. Milanzi Learned Counsel for the Respondent in his submissions, where members and non-members had to be deducted from their wages an agency shop fee. **Agency shop fee agreement** and another one known as **closed shop fee agreement** are two types of collective agreement

[35] S. 4 of Act No. 6 of 2004 Cap 366 R..E. 2009 [Tanzania]
[36] Labour Relations Act No. 66 of 1995 [South Africa] *ibid* S. 213

with different meaning. Section 72 (2) of the Employment and Labour Relations Act provides for an agency shop fee.

The term agency shop fee agreement is defined clearly and in plain wordings by the Labour Relations Act 1995 of South Africa which is in parimateria with the Employment and Labour Relations Act 2004 of Tanzania, the Labour Relations Act define agency shop fee as follows:-

> *...A representative trade union and an employer or employers' organization may conclude a collective agreement to be known as an **agency shop agreement**, requiring the employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof...*[37]

The words "*who are not members of the trade union*" does not mean, in this context, those employees who have not filled form no. 6 which instruct the employer to deduct membership fees as submitted by the applicant's counsel, it is a wrong interpretation of the words "*non-members*" by the applicant. The applicant has also in this context failed to comprehend the clear words of section 72 (9) of the Employment and Labour Relations Act 2004 which define agency shop fee and who is a non-member. The section reads:-

> *72 (9) ...For the purpose of this section "agency shop" means a union security arrangement in*

[37] See S. 25 (1) of the Labour Relations Act No. 66 of 1995 [South Africa] and S. 72 (9) of the Employment and Labour Relations Act No. 6 of 2004 [Tanzania]

> *terms of which* ***employees in a bargaining unit, who are not members of the recognized trade union*** *are required to pay an agency fee in the trade union*[38] *[emphasis mine].*

Therefore the words non-members are those employees in the bargaining unit who are not members of the trade union that has entered into recognition agreement and which has entered into an agency shop agreement but the employees are eligible to be members of the trade union in so far as its constitution is concerned. Talking on the fundamental feature of an agency shop agreement Professor Annal Basson et-al in the article titled "**collective bargaining and the law**" writes and puts clear the meaning of "**non-members**" that:-

> *...The employer agrees in a collective agreement to deduct an agency fee from the wages of certain employees these employees are not members of the trade union that entered into the agency shop agreement, but they are eligible for membership of this union...*[39]

The applicant [TUICO] members who are not members of the recognized and registered trade union [FIBUCA] that had entered into an agency shop agreement cannot "*escape*" to be deducted the agency shop fee by the respondent because they are eligible for membership in that trade union which had entered into an agency shop agreement AND THE

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[38] *op. cit* note 4 the definition of agency shop is more or less the same with the definition of the term in the Labour Relations Act of South Africa No. 66 o 1995

[39] Prof. Basson et al *op. cit* note 20 at p. 70

LAW s. 72 (4) of Act No. 6 of 2004 is clear.. However they are not compelled to be members of the trade union S. 72 (3) (a) of the Act[40]. The employee will not be deducted agency shop fee:-

> *...If an employee's does not qualify for membership in terms of the unions constitution, the agency shop agreement will not apply to that employee and no agency fee may be deducted from his or her remuneration...*[41]

I entirely and respectfully agree with the learned author Professor Annal Basson position above, the position which is also prevalent in South Africa and Tanzania Labour Laws. The applicant if he wants his members not to be deducted the agency shop fee by the respondent, [he] must prove that the members [of the applicant] are not eligible to be members of the trade union which has entered into an agency shop fee agreement with the respondent regard being had the fact that they are not compelled to be members of that trade union thereof[42]. Perhaps I must conclude on issue number two by defining the term closed shop fee agreement. By closed shop agreement means where:-

> *...A representative trade union and an employer or employers organization may conclude a collective agreement to be known as a closed shop agreement*

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[40] The Employment and Labour Relations Act No. 6 of 2004 Cap 366 R.E. 2009 *op. cit* note 4
[41] Proffessor Basson *op. cit* note 20 at p. 72
[42] *op. cit* note 41 S/ 72 (3) (9)

requiring all employees covered by the agreement to be members of the trade union...[43]

I will conclude by answering the third and fourth issue together. The third and fourth nagging questions as stated in this discussion above are as hereunder:-

(iii) Whether the deduction of agency shop fee from the wages of the respondent's employees who are non-members is against the law.

(iv) What is the purpose of agency shop fee agreements in the context of Employment and Labour Relations.

The respondent's learned counsel has correctly submitted that the authority to deduct agency shop fee from employees who are not members is guided by the law of Employment and Labour Relations Act No. 6 of 2004. I entirely and respectfully agree with the learned counsel that the move of the respondent to deduct the agency shop fee from the non-members as well as form the members is in accordance with section 72 (3) (c) (d) of the Act[44] supra. The section authorize the deduction of agency shop fee from both members and non-members of the trade union that had entered into the agreement. The law also does not require a prior consent of the employee to deduct the agency shop fee:-

...Notwithstanding the provision of any law or contract an employer may deduct an agency fee under an

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[43] *op. cit* note 36 [LRA No. 66 of 1995] S. 26 (1) which is in parimateria with the ELRA No. 4 of 2004

[44] The ELRA *op. cit* note 4 subsection (3) of the Employment and Labour Relations Act No. 6 of 2004 deals with the requirements for a binding agency shop agreement

agency shop agreement that complies with the provisions of this section form an employee's wages without the consent of that employee...[45].

It is not therefore against the law for the respondent to deduct agency shop fees from the employees who are members and who are not members of the trade union. But what is the purpose of agency shop fee agreement in the context of Employment and Labour Relations? This question is easily answer by the Act itself ***notebien*** section 72 (3) (d) (e) which reads that:-

> ... *(d) The amount deducted from both members and non-members shall be paid into a separate account administered by the trade union.*
>
> *(e) The monies in that account may only be used to advance or defend the socio-economic interest of the employees in that work place and shall not be used to pay:-*
>
> *(i) An affiliation fee to a political party.*
>
> *(ii) Any contribution to a political party of person standing for political office...*[46]

The spirit of the above section in the Employment and Labour Relations Act 2004 pre-supposes the purposes of agency shop fees in Employment and Labour Relations. The agency shop fee is used to advance the economic and socio interest of the employees and defends it.

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[45] *ibid* S. 72 (4) of the Act
[46] *ibid S. 72 (3) (d) (e)*

Further when collective agreements are entered by the employer and a trade union, in certain circumstances, the collective agreement entered do not bound the employees who are not members of the trade union, but for the sake of socio economic interest of the employees at the work place and for the convenience of administration at the work place, the employer extends the provision of a collective agreement to non-member, as rightly pointed out by Proffessor Annal Basson et-al, [that the employers]:-

> *...May in the interest of administrative convenience, extend the provision of a collective agreement to non-members, that is to say, in other words, in certain circumstances employees who are not members of a union may derive benefits from a collective agreement entered into, by a union...these non-members employees are sometimes called "free riders" because they derive benefits for free they do not pay union subscriptions, but still obtain the benefits of the union's bargaining...*[47]

It may be concluded that in the instant case the employees who are not members of the trade union which entered into the agreement and which is recognized as a bargaining unit in the work place do [non-members] derive benefits of the union's bargaining regard being had to the fact that they [non-members] do not pay the party's subscription fees to the recognized trade union to wit; FIBUCA's trade union subscription fees. The respondent employer and the trade union FIBUCA has exercised their

[47] *op. cit* note 20 Prof. Annal Basson et - al p. 70 article "collective bargaining and the law". Paragraph 5.7 Agency Shop and closed shop Agreements

organization rights respectfully. In the words of Dr. Tulia Ackson[48] in her article; "**Trade Unions Employers' Association and Federations**" puts that's:-

> *...A trade union may exercise any of the rights described above, [organizational rights]... the employer is obliged to meet with the trade union within 30 days. The meeting is primarily for the purpose of conducting a collective agreement that grants the rights...The employer and the trade union are required to meet and conclude a collective agreement "granting the right and regulating the manner in which the right if [sic] to be exercised...*[49]

The exercise of the organizational rights by the respondent and the trade union mentioned supra were by and large the procedure towards conclusion of the Recognition Agreement entered inter-parties and later an agency shop agreement. Since there is no proof to the contrary at this moment then as rightly pointed out by Dr. Tulia, the parties has gone through the procedure for exercising organization rights thus:-

> *...There are basically four stages involved in the procedure for exercising organization rights. Firstly, the trade union gives notice to the employer about the right which the trade union is about to exercise. Secondly, the employer must respondent and meet the trade*

[48]Tulia Ackson LLB, LLM [Dar] Ph. D [Cape town] is a senior lecturer in law University of Dar es Salaam and Advocate of the High Court

[49]Tulia Ackson article "Trade Unions Employers Association and Federations" Co-Author in a book titled Employment and Labour Law Relations in Tanzania. Law Africa Publishing (T) Ltd., 2011 pp. 200 and 201

union within 30 days of the notice, thirdly, where the second stage has not been successful a trade union is entitled to refer the dispute to the Commission for Mediation and Arbitration [CMA] lastly, where the CMA has failed to resolve the dispute... take the dispute to the Labour Court which shall make appropriate orders...[50]

The contention by the applicant [TUICO] in this matter that he represents the majority of employees and not the trade union [FIBUCA] which had entered into a recognition agreement and agency shop fee agreement with the respondent is not a concern of this Judgment because there are procedures to be followed by the trade union in order to be recognized as the exclusive bargaining agent of the employees. S. 67 (1) however the Employment and Labour Relations Act No. 6 of 2004 S. 67 (2) does not put a mandatory term "shall" although not all where the word shall connotes mandatory. It depends on the circumstances of each case. The section reads:-

*...An employer or employers association **may not** recognize a trade union as an exclusive bargaining agent **unless the trade** union is registered and*

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[50] Employment and Labour Law Relations in Tanzania [editions] Law Africa Publishing [T] Ltd., 2011 Co-Author **Bonaventure Rutinwa** LLB [Dar] LLM [Queen's Canada] BCL D. Phil [Oxon] is associate Professor of Law University of Dar es Salaam and Advocate of the High Court
Evance Kalula LLB [Zambia] LLM [London] Ph. D. [Warwick] **Colnel Mtaki** LLB, LLM [Dar] Ph. D. [Ghat] is a Senior Lecturer University of Dar es Salaam and Advocate of the High Court
Tulia Ackson LLB, LLM [Dar], Ph. D [Cape town] is a Senior Lecturer, University of Dar es Salaam and Advocate of the High Court
Pascal Kamala, LLB [Dar] LL.M [Capetown] is an Advocate of the High Court, Kesaria and Company Dar es Salaam

*represents the **majority of the employees** in the bargaining unit...*

The applicant [TUICO] has not told the court if he passed through the channels of Section 67 (1) to 67 (7) of the Employment and Labour Relations Act 2005.

Nevertheless suffice to say here that the respondent [NMB] had recognized **FIBUCA** as the exclusive bargaining agent of the employees in that unit. The wordings of the above section plainly interpreted means that the employer may also **recognize** a registered trade union which does not represent the majority employees at the work place. Item 50 (7) of the Employment and Labour Relations [Code of Good Practice] Rules 2007 comes to the aid thus:-

[7] ...An employer may recognize a registered trade union without the union being a majority. Provided that if the bargaining unit attains majority membership all employees including those who are not belonging to the trade union shall be members of the trade union...

In the event and on the foregone this application is by and large unmerited and it has no pegs on which to erect or lay its tent. It is a mere kicks of a dying horse ***in articulo mortis*** [at the point of death]. The application is dismissed ***in toto*** [entirely].

I.S. Mipawa
JUDGE
24/07/2015

Appearance:-

1. Applicant: Mr. Noel Nchimbi, TUICO - Present
2. Respondent: Mr. Frank Milanzi, Advocate for the Respondent - Present

Court: This Judgment has been read today in the presence of both parties as shown in the appearance above.

I.S. Mipawa
JUDGE
24/07/2015