IN THE HIGH COURT OF THE UNITED REPUBLIC

OF TANZANIA LABOUR COURT

AT DAR ES SALAAM

MISCELLANEOUS LABOUR APPLICATION NO. 247 OF 2014

BETWEEN

TANZANIA LOCAL GOVERNMENT

WORKERS UNION (TALGWU)................................. 1ST APPLICANT

HOKELAI G. MPEMBA...2ND APPLICANT

VERSUS

ATTORNEY GENERAL..1ST RESPONDENT

CHIEF SECRETARY..2ND RESPONDENT

RULING

20/04/2015 & 04/06/2015

Mipawa, J.

The Applicants namely Tanzania Local Government Workers Union, styled TALGWU and Hokelai G. Mpemba herein after nomenclatured as the first and second Applicants respectively have filed this application for leave to apply for orders ***videlis***:-

(i) Of declaratory declaring the Chief Secretary Secular No. 2 of 2013 Ref. No. CAB. 157/547/01/B/145 dated April, 2013 regarding participation of Public Servants in Trade Union activities and order F. 22 (c) (iii) of the Standing Orders for Public Service, 2009 as being illegal.

(ii)[Orders] of certiorari to quash the Chief Secretary Secular No. 2 Ref. No. CAB. 157/547/01/B/145 dated April, 2013 regarding participation of Public Servants in Trade Union activities and order F. 22 (c) (iii) of the Standing Orders for Public Service, 2009 Barring Head of Division/Departments and Units from becoming members of any trade union.

This application for leave to apply for prerogative orders of declaratory and certiorari has been preferred as against the Attorney General and the Chief Secretary who are first and second respondents.

This application has been made under Rule 5 (1), (2) (a) (b) (c) and (d), (3) (5) and (6) and 7 (1) (2) of the Law Reform [Fatal Accidents and Miscellaneous Provisions] [Judicial Review Procedure and Fees] Rules, 2004; section 17 (2) and 19 (2) and (3) of the Law Reform [Fatal Accidents and Miscellaneous Provisions] Act[1]. Section 2 (1) and (3) of the Judicature and Application of Laws Act[2]; section 14 (1) of the Law of Limitation Act[3]; Section 51 and 52 (1) of the Labour Relations Act[4] [sic] No. 7 of 2004; Section 94 (1) (f) (i) of the Employment and Labour Relations Act 2004[5]. Rule 24 (1) (2) (3), 55 (1) and (2) and 56 (1) of the Labour Court Rules[6].

[1] Cap 310 RE 2002
[2] Cap 3158 RE 2002
[3] Cap 89 RE 2002
[4] Cap 300 RE 2009 Act No. 7 of 2004
[5] Act No. 6 of 2004 Cap 366 RE 2002
[6] Government Notice No. 106 of 2007 [GN. 106 OF 2007 The Rules]

At this pre-natal stage of the application the parties were allowed to file their written submission as regards whether or not the instant application should be granted. They have done so but ***in extenso*** [at lengthy] and ***in totidem verbis*** [in many words], with respect it was not necessary to take that "*marathon*" rather regard must have been had on whether or not at this stage the Applicant has a justifiable cause. This Court in **Tanzania Safaris and Hunting [2003] Ltd. V. The Minister of Natural Resources and Tourism**[7] spake that:-

> *... In terms of the law section 17 (2) of the Law Reform [Fatal Accident and Miscellaneous Provisions] Act, Cap 310 RE 2002 at this stage the Court is concerned to determine only whether the Applicant has justifiable cause...*[8]

Nevertheless be that as it may I will attempt albeit in brief to summarize what the Learned Counsel Mr. Odhiambo Kobas for the Applicant and Mr. Karim Rashid State Attorney for the Respondent have ventured to submit.

Mr. Odhiambo Kobas Advocate for the Applicants submitted that they needed the leave of this Court to apply for an extension of time to file the instant application in terms of Rule 5 (1) of the Law Reform [Fatal Accidents and Miscellaneous Provisions] Judicial Review Procedure and Fees Rules, 2004, because unless such leave is granted the Applicant cannot file any application in that regard. Six months had expired also

[7] Miscellaneous Civil Application No. 11 of 2003 HC DSM [Mujulizi, J.]

[8] *ibid* at p. 2 per Mujulizi, J.

since they came to be aware of the Chief Secretary's Circular and thence the Applicants were outside the time limit. Hence the application for extension of time within which to apply for prerogative order to certiorari and declaration. The main ground (s) is that:-

> *...The Chief Secretary Circular and Standing Orders have raised seriously triable points of law on the rights and freedom of Public Servants to join and take part in Trade Union activities deserving to be adjudicated upon by the Labour Court...*[9]

The Learned Counsel for the Applicants has formulated the triable issues or points of law fit to be adjudicated by the Labour Court being as follows:-

(a) *Whether the Chief Secretary Circular No. 2 of 2013 dated 1st April 2013 that bars Public Servants holding senior position from taking part in leadership position in trade unions is illegal for being in contravention of the rights and freedom of association provided under Section 9 (1) (a) and (b), 9 (2) (c) and 9 (6) (b) (i) of the Employment and Labour Relations Act*[10].

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[9] Applicant's submissions (written) at page 4 the Applicant has reiterated if application for leave can be granted the issue is desirable to be adjudicated upon by the Labour Court

[10] *op. cit* note 8. Act No. 6 of 2004 provides under section 9 (1) that every employee shall have the right (a) to form and join a trade union (b) to participate in the lawful activities of the trade union. Section 9 (2) (c) provides that notwithstanding the provisions of sub-section (1) – then 9 (c) a senior management employee may not belong to a trade union that represents the non senior management employees of the employer. Section 9 (6) (b) (i) senior management employee means an employee who by issue of that employee's position (i) makes policy on behalf of the employer

(b) *Whether order F. 22 (c) (iii)[11] of the Standing Order for the Public Service, 2009 that bars Senior Public Servants including but not limited to heads of Divisions Department and unit from becoming members of any trade union is illegal for being in contravention of the rights and freedom of association provided for under section 9 (1) (a) and (b), 9 (2) (c) and 9 (6) (i) and (ii) of the Employment and Labour Relations Act, 2004.*

The presence of serious triable points of law in a matter for which extension of time is sought for the same to be filed and tried by the Court by itself constitute sufficient reasons for extension of time under section 14 (1) of the Law of Limitation Act 1971 and under Rule 56 (1) of the Labour Court Rules. To cement the arguments the Applicant's Counsel referred to this Court the decision of the Court of Appeal in **Etienne Hotel V. National Housing Corporation**[12], in which it was held that:-

> *...On the merits of the application, I am satisfied that the issue of the period of limitation of the counter claim is a serious triable point of law in the intended appeal. Under the circumstances the issues of limitation constituted sufficient ground for granting extension of time. In order to establish whether or not the counter claim and decree there from are sustainable in law...*[13]

[11] Standing Orders for the Public Service 2009 3rd Edition [Pursuant to S. 35 (5) of the Public Act Cap 298] Order F. 22 (c) (iii) reads: the following public employees are barred from becoming members of any trade union or anybody or association affiliated to trade union (a)...(b)...(c) a public servant who (i) ...(ii)... (iii) is the Head of Division/Department/Unit

[12] [1992] TLR at p. 185

[13] Ibid as quoted from Applicant's submission at p. 4-5

The Applicant's Counsel further referred to this Court on the issue of "*sufficient cause*" the case of **Principal Secretary, Ministry of Defence and National Service V. Derram Valambia**[14], where the Court of Appeal held that:-

> *...We think that whereas here, the point of law at issue is the legality or otherwise of the decision being challenged that is of sufficient importance to constitute "sufficient cause" within the meaning of Rule 8 of the Rules for extending time. To hold otherwise would amount to permitting a decision which in law might not exist to stand. In the context of the present case, this would amount to allowing garnishee order to remain on record and to be reinforced even though it might very well turn out that the order is, in fact a nullity and does not exist in law. That would not be in keeping with the role of the Court whose primary duty is to uphold the rule of law...*[15]

Submitting further on what constituted good cause the Applicants Counsel referred to this Court's own decision in **Zan Air Limited V. Othman Omary Mussa**[16], in which it was stated:-

> *...Under the aspect, good causes generally encompass grounds necessitating hearing of the application on merit [which may have been raised in the application*

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[14] [1992] TLR at 185 CAT

[15] *ibid* as a voted from Applicant written submission at p. 5

[16] Miscellaneous Application No. 285 of 2013 HCLD Rweyemamu, J.

for revision or noted by the Court **suo mottu**]. *Example of such ground include, but are not limited to, situations "***where the point of law at issue [in the intended application] is the LEGALITY of the decision being challenged** *[see motor vessel sepideh & Pemba Island Tours and Safaris V. Yusuf Mohamed Yusufu and Ahmad Abdallah CAT*[17] *at Zanzibar...*

The Learned Judge Rweyemamu, J. finally "*crossed the border*" and stated that..."*in my view that ground raises an important point of law, necessitating consideration of the application for revision. Under the circumstances, I find that the point raised by the Applicant amount to good cause for granting the application*"[18].

On the application to be granted leave to apply for prerogative order of certiorari and declaration, the Learned Counsel for the Applicant argued that the requirement to seek leave before applying for prerogative order of certiorari is provided for under Rule 5 (1) of the Law Reform [Fatal Accidents and Miscellaneous Provisions] [Judicial Review Procedure and Fees] Rules 2014 which states that; "*Application for Judicial review shall not be made unless a leave to file such application has been granted by the Court...*"[19].

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[17] *ibid* per Rweyemamu, J. quoting Civil Application No. 91/2013 CAT at Zanzibar where the Court of Appeal reiterated the Principle in Valambia [1992] TLR 185 at 189

[18] *op, cit* note 15 per Rweyemamu, J. at p. 4

[19] Applicant's submission *op. cit* at page 8

Therefore for the Court to grant leave on the application for prerogative orders, the Applicant must satisfy the Court that they have an arguable case, which merits hearing on whether the Applicant has justifiable cause. He referred to the case of **Tanzania Safaris and Hunting [2003] Ltd. V. The Minister of Natural Resources and Tourism**[20] [Mujulizi, J.] where it was held that:-

> *...In terms of the law section 17 (2) of the Law Reform [Fatal Accident and Miscellaneous Provisions] Act Cap. 310 RE 2002, at this stage the Court is concerned to determine only whether the Applicant has a justifiable cause and is not a case where a busy body is seeking to intermeddle with the smooth conduct of Public Affairs...*[21]

The test for granting leave for prerogative order was also stated by the supreme Court of Judicature of Jamaica in **Regna V. Industrial Disputes Tribunal**[22] where it quoted with approval the test as stated by **Lord Diplock in Inland Revenue Commissioner V. National Federation of self employed and Small Business Ltd.**[23], that:-

> *...The whole purpose of requiring that leave should be first obtained to make the application for judicial review would be defeated if the Court were to go into the matter in any depth at that stage. If on a quick perusal*

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[20] *op. cit* note 7

[21] Per Mujulizi, J. in Tanzania Safaris and Hunting case as quoted from the Applicant's written submission p. 9

[22] Claim No. 2009 HCV 04798 Supreme Court of Jamaica state at p. 14 of the typed decision supplied by the Applicant

[23] Per Lord Diplock [1982] A.C. 617 - 644

of the material then available, the Court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the Applicant the relief claimed, it ought, in the exercise of judicial discretion, to give him leave to apply for that relief. The discretion that the Court is exercising at this stage is not the same as that which is called upon to exercise when all the evidence is in and the matter has fully argued at the hearing of the application...

The Applicant's Counsel concluded that the test for the Court to consider on whether to grant an application for leave to apply for judicial review/prerogative order of certiorari is whether the Applicant has a prima facie case, or whether the Applicant has satisfied the Court that there is arguable ground for judicial review having a realistic prospect of success, as it was stated in **Sharma V. Bell Antoine**[24] case that:-

> *...The ordinary rule now is that the Court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; see R. V. Legal Aid Board Exp. Hughes [1992] 5 Admin. LR 623, 628 and Fordhan Judicial Review Handbook 4th Ed. [2004] p. 426...*[25]

[24] [2007] I.W.L.R. 780
[25] *ibid* see Applicant's submission at p. 10

In the final analysis the Applicant's Counsel submitted that the application has made out an arguable case sufficient to warrant this Court to exercise its discretionary power to grant leave to the Applicant for judicial review/prerogative order of certiorari.

The Respondent in his written submission controverted that an application for prerogative orders cannot be invoked where effective and adequate statutory remedy is available. He cited the case of **Sanai Murumbe and another V. Muhere Chacha**[26], where it was held that:-

> *...An order of certiorari is one issued by the High Court to quash the proceedings of and decision of a subordinate Court or tribunal or public authority where among others there is no right of appeal...*[27]

That the Applicant's constitution petition was struck out by this Court[28], on reasons that there were availability of statutory alternative remedy which this Court Rweyemamu, J. held that the Applicant has alternative redress provided for in section 94 (1), f (i) of the Employment and Labour Relations Act[29]. The Learned State Attorney for the Respondents further submitted that the ruling of this Court in **Sanai Murumbe and another V. Muhere Chacha**[30], has not been set aside

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[26] [1990] TLR. 54

[27] *ibid* as quoted from Respondents written submission p. 3

[28] Miscellaneous Application No. 326 of 2013 TALGWU and another V. Attorney General and Chief Secretary (HCLD) at p. 14 per Rweyemamu, J.

[29] ELRA No. 6 of 2004 Cap. 366 RE. 2009, section 94 (1) f (i) reads 94 (1) subject to the Constitution of the United Republic of Tanzania 1977, the Labour Court shall have exclusive jurisdiction over the application, interpretation and implementation of the provisions of this Act and to decide ...(a)...(b)... (c) ....(d)...(e)...(f) application including (i) a declaratory order in respect of any provision of this Act (ii) an injunction

[30] *op. cit* note 25

either on appeal or review or revision application and cemented his submission by referring to this Court to case of **Ally Linus and Eleven others V. Tanzania Harbours Authority and the Labour Conciliation Board of Temeke District**[31], in which the Court of Appeal stated that:-

> *...With due respect to the Learned Jaji Kiongozi, it is not a matter of courtesy but a matter of duty to act judiciously which requires a Judge not lightly to dissent from the considered opinions of his brethren ...this is necessary to avoid giving the parties and the general public a false impression that results of cases, in Courts of law perhaps depend more on the personalities of Judges than on the law of this Land...*[32]

The Respondent further argued that the application for declaratory orders under Section 94 (1) f (ii) of the Employment and Labour Relations Act does not require a prior leave, Rule 24 (1) (2) and (3) of the Labour Court Rules. Therefore the application for extension of time to file an application for leave and the application for leave to file a prerogative orders are misconceived as the Applicant has effective and adequate statutory remedy under section 94 (1) f (i) of the Employment and Labour Relations Act[33]. The Respondent challenged that the Applicant has not stated reasons for the delay in which extension could be granted upon sufficient cause under section 14 (1) of the Law of Limitation Act[34], thus laxity in action and ignorance of law by the Applicant or her counsel does

[31] [1998] TLR 5
[32] *ibid* as quoted from Respondent's submission p. 3
[33] *op. cit* note 28
[34] *op. cit* note 3

not constitute "*good cause*"[35]. The principles were stated by the Court of Appeal of Tanzania through a reference between **Wankira Benteel V. Kaiku Foya**[36] [i.e. principles on good cause for extension of time].

The Respondent Counsel further submitted that the alleged serious points of law itemized under paragraph 15 of the affidavit[37], in support of the applications are not serious points of law, but are mere issues framed out of the Applicant's Counsel personal sentiments. Besides the issues cannot be adjudicated in a judicial review application as this Court has ruled out that sufficient and adequate redress exist under section 94 (1) f (i) of the Employment and Labour Relations Act[38].

Concluding his written submission the counsel for the Respondent reiterated that:-

> *...The Applicant is also applying for leave to apply for declaratory orders. We submit that there is no requirement for leave in an application for declaratory orders under section 94 (1) f (i) of the Employment and Labour Relations Act ...the Applicant argues that a prayer for declaratory orders is one of the judicial review reliefs... The judicial reviews application is governed by the Law Reforms [Fatal Accidents and Miscellaneous Provisions] Act [Cap 358 RE 2002...*[39]

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[35] *op. cit* note 26 Respondent's submission at p. 4
[36] Civil Reference No. 4 of 2000 Court of Appeal of Tanzania
[37] On details of paragraph 15 of Applicant's affidavit see note 9 and 10 *op. cit*
[38] *op. cit* note 28 on S. 94 (1) f (i) of Act No. 6 of 2004
[39] *op. cit* note 26 at p. 8

In section 17 of the Limitation Act the High Court can only grant the orders of mandamus prohibition and certiorari in a application for judicial review. Thence declaratory order is not one of the orders granted under the Law Reforms [Fatal Accidents and Miscellaneous Provisions] Act. Hence no prior leave[40].

I have carefully read the written submission of both parties in ***ex-abandunt cautela*** [with eyes of caution or extreme caution] I have also gone through various documents filed by the parties and taken due consideration to the cited authorities of case law copies of which were made available to this Court. Indeed with all what the authorities cited proclaim, I highly respect and subscribe to them, from that which require the presence of serious triable issues or point of law in order for an extension of time sought to be granted eg. **Etienne Hotel V. National Housing Corporation**[41], where the point of law at issue was the legality or otherwise of the decision being challenged that was sufficient cause for extending time. And in **Principal Secretary, Ministry of Defence and National Service V. Derram Valambia**[42] **and in Zanzibar Air Limited V. Othman Omary Mussa**[43].

Other authorities on the granting of prerogative orders supra[44], last on Applicant's cited case, was on the test for the Court to consider on

[40] *op. cit* note 26 at p. 8
[41] *op. cit* note 11
[42] *op. cit* note 13
[43] *op. cit* note 15
[44] *op. cit* note7, 20 Tanzania Safaris and Hunting case per Mujulizi, J. and Jamaica case of Regna V. Industrial Dispute Tribunal *op. cit* note 21

whether or not to grant an application for leave to apply for judicial review/prerogative order of certiorari, the test is whether the Applicant has a prima facie case[45].

Now the remedy which was first sought by Applicant in Miscellaneous Application No. 326 of 2013 between **TALGWU and another V. Attorney General and Chief Secretary** this Court held that there were availability of statutory alternative remedy or redress provided for under section 94 (1) f (i) of the Employment and Labour Relations Act No. 6 of 2004 and hence it struck out the Applicant's constitution petition[46]. The relevant section which this Court relied as an alternative remedy to the Applicant's constitution petition which was struck read as follows:-

> *...94 (1) subject to the constitution of the United Republic of Tanzania 1977, the Labour Court shall have exclusive jurisdiction over the application interpretation and implementation of the provision of this Act and to decide:-*
>
> *(a)* ....
> *(b)* ....
> *(c)* ....
> *(d)* ....
> *(e)* ....
> *(f)* *Application including:-*
>
> *(i)* *A declaratory order in respect of any provision of this Act or*
>
> *(ii)* *An injunction.*

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[45] *op. cit* note 23
[46] *op. cit* note 27 per Rweyemamu, J.

I entirely and respectfully subscribe to this Court's decision as held in the constitution petition between **TALGWU and another V. Attorney General and Chief Secretary**[47]. I also subscribe to the decision of this Court in **Sanai Murumbe and another V. Muhere Chacha**[48]. In which this Court as rightly submitted by the Learned Counsel for the Respondent held that:-

> *...An order of certiorari is one issue by the High Court to quash the proceedings of and decision of a subordinate Court or tribunal or public authority. where among others there is no right of appeal*[49]*...*

In so far as I understand and as the Learned State Attorney for the Respondents had submitted the above cases to wit **TALGWU and Another V. Attorney General and Chief Secretary**[50] **and Sanai Murumbe and Another V. Muhere Chacha**[51] have not been set aside either or appeal review or revision. To deviate from the above cases may cause problems as it was held by the Court of Appeal of Tanzania in **Ally Linus and eleven others V. Tanzania Harbours Authority and Labour Conciliation Board Temeke District**[52] that [to deviate or dissent from brethren decision]:-

> *...[It] is not a matter of courtesy but a matter of duty to act judiciously which requires a Judge not lightly to*

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[47] *op. cit* note 27
[48] *op. cit* note 25
[49] *op. cit* note 44
[50] *op. cit* note 25
[51] *op. cit* note 30
[52] *op. cit* note 31

dissent from the considered opinion of his brethren... this is necessary to avoid giving the parties and the general public a false impression that results of cases, in Courts of law perhaps depend more on the personalities of Judges than on the law of this land...[53]

Having had in mind the position as put down by Courts and after reading the affidavit of the Applicants[54], and the Chief Secretary Circular of 1st April, 2013[55], and TALGWU Constitution[56], it is my considered opinion, that the Applicants are alleging that one of the rights relating to freedom of Association under section 9 of the Employment and Labour Relations Act No. 6 of 2004 has been infringed by the Respondents[57]. A cursory glance on paragraph 4 and 5 of the affidavit of the Applicants suggests the infringement, it reads:-

> *4...The 2nd Applicant is the Public Servant holding the position of Ward Executive Officer, Mnazi Ward, Lushoto District, Tanga Region and is at the same time a member of TALGWU Regional Executive Committee...*[58]
>
> *5...That on or about the 1st April, 2013 the 1st Respondent issued the Chief Secretary Secular No.2 of 2013 dated 1st April, 2013 barring public servant holding senior position in all*

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[53] *op. cit* note 30

[54] Kibwana R. Njaa and Hokilagi Mpemba joint affidavit

[55] Waraka wa Mkuu wa Utumishi wa Umma Na. 2 wa 2013

[56] Tanzania Local Government Workers Union Constitution of 2006

[57] Section 9 of the Employment and Labour Relations Act concerns with employees rights to freedom of association to form and join a trade union and to participate in the lawful activities of the trade union

[58] TALGWU, Tanzania Local Government Workers Union

work places including but not limited to the 2nd Applicants from taking part in leadership positions in trade union...

In view of the above position and allegations, therefore if a person (s) alleges that one of the rights relating to freedom of Association as laid down under section 9 of the Employment and Labour Relations Act 2004, has been infringed, the following procedure have to be followed [unfortunately section 9 of the Act does not lay down the dispute resolution procedure on the infringement of the Freedom/Association]. However the party who alleges that the rights to freedom of Association have been infringed has to utilize the remedy found in the provisions of section 94 (1) (d) of the Act[59], to file a complaint/Labour Dispute in the Labour Court for the infringement of the freedom of Association thereof. Complaint has been defined in the Act[60] thus:-

> *...Means **a dispute arising from the application interpretation or implementation of:-***
>
> *(a) An agreement or contract with an employee.*
>
> *(b) A collective agreement.*
>
> *(c) **This Act,** or any other written law administered by the Minister.*
>
> *(d) Part VII of the Merchant Shipping Act 2003.*

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[59] Employment and Labour Relations Act No. 6 of 2004 op. 366 RE 2009. The Labour Court shall have exclusive jurisdiction over the application. Interpretation and implementation of the provisions of this Act and to decide (d) complaints other than those that are to be decided by Arbitration under the provisions of this Act

[60] *ibid* section 4 of the Act

The dispute resolution procedure for disputes about Freedom of Association requires therefore the utilization of the following steps ***videlis***:-

> ***STEP ONE***: *The first step in the process is an attempt to settle the dispute through mediation in the Commission for Mediation and Arbitration – CMA*[61].
>
> ***STEP TWO***: *The second step is that if the dispute remains unresolved after mediation before the Commission it must be referred to the Labour Court for adjudication [but the parties may agree that the dispute remain at the Commission for Mediation and Arbitration].*
>
> ***STEP THREE***: *The Labour Court will then decide whether a right has been infringed and, if this is the case, grant an appropriate remedy*[62].

The above resolution of disputes about Freedom of Association has also been extensively followed by the **Labour Court** of South Africa and the **Commission for Conciliation Mediation and Arbitration [CCMA]** of South Africa a prototype or an equivalent to the Commission for Mediation and Arbitration [CMA] of Tanzania. South Africa Labour Laws and Legislations are ***in-parimateria*** with our Labour Laws and actually

[61] CMA is the Commission for Mediation and Arbitration established under section 12 of the Labour Institution Act No. 7 of 2014 Cap 300 RE 2009

[62] Section 9 of the Labour Relations Act [1995] of the Republic of South Africa provides for the procedure to follow in resolution of the disputes about Freedom of Association

heavily borrowed from South Africa Republic. Proffessor Annal Basson[63], Professor PAK le Roux[64], and Dr. Emil Strydom[65], among others [co-authors] in their masterpiece text book titled Essential Labour Law Vol. 2 Collective Labour Law [2002] state that [I subscribe to the position:-

> *...The party who alleges that his or her right to freedom of Association has been infringed bears the burden of proving the facts on which this allegation rests. In most cases it will be the employee who alleges that the employer did something which constituted an infringement of the right to freedom of association. The employee will, for example, have to prove that he or she was required not to become a trade union member, that he or she was prevented from participating in the lawful activities of a trade union or for exercising the duties of a trade union representative...*[66]

On the part of the employer who usually the allegations are leveled against him will have to prove that the conduct did not constitute such an infringement. When the employee proves his case on the facts presented, then the onus shifts to the employer to prove that the facts do not

[63] Prof. Basson BLC, LLB (Pret) LL.D [Unisa] is a Professor in the Department of Merchantile Law at the University of South Africa [Unisa] an Advocate of the High Court, she is a part-time Commissioner of the CCMA, assessed in a number of Labour Appeal cases

[64] Prof. Le Roux LLM [Unisa] LL.M [London] is a Professor in the Department of Merchantile Law Unisa Attorney of the High Court experienced Labour Mediator, co editor of South Africa Law of unfair dismissal Essential Security Law and contemporary Labour Laws.

[65] Dr. Emil Strydom, BA, LL.B [Pret] LL.M, LLD [Unisa] is Industrial relations manager at the chamber of mines of South Africa. She is an Attorney of the High Court. Assessed in a number at Labour Appeal Court cases

[66] Essential Labour Law Vol. 2 Collective Labour Law 3rd Edition 2002 Labour Law Publications, HOUGHTON at p. 33-34

constitute an infringement to the Freedom of Association. Under section 9 of the Employment and Labour Relations Act 2004[67].

On the foregone discussion and regard being had the subject matter of the alleged infringement of the Freedom of Association as unearthed by the Applicants in their affidavit and written submission and after considering the fact that the Applicants came to realize of the Chief Secretary Circular No. 2 of 2013 which is alleged by the Applicants to have the effect in the implementation of section 9 of the Employment and Labour Relations Act No. 6 of 2004, on the Freedom of Association I consider as serious triable points of law in a matter which an extension for time has to be granted in order for the Applicants to file a dispute/complaint and be heard for the interest of justice and the Freedom of Association right.

In this connection of the Freedom of Association, reference can be made also to Article 2 and 3 of the **Freedom of Association and Protection of the Right to Organise Convention No. 87 of 1984** [International Labour Organization Convention] which reads:-

> ***Article 2***
>
> *Workers and employers, without distinction whatsoever, shall have the right to establish and subject only to the rules of the organization concerned, to join organizations of their choosing without previous authorization.*

[67] *ibid* at p. 34 Section 5 of Labour Relations Act [1995] of South Africa is in parimateria with s. 9 of ELRA

Article 3

1. *Workers' and employers organization shall have the right to draw up their constitution and rules, to elect their representatives in full freedom to organize their administration and activities and to formulate their programmes.*
2. ***The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof***[68]. *[emphasis mine]*

In event the application for extension of time is granted, the Applicants have to file a complaint/dispute as an alternative remedy if they still wish within sixty (60) days from now. The other joint applications are, to say the least, baseless and are therefore vacated, in the circumstances. Application is merited to the extent as shown in this Ruling.

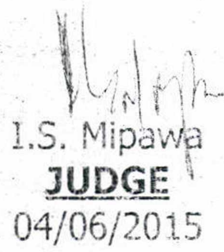
I.S. Mipawa
JUDGE
04/06/2015

Appearance:-

1. Applicants: Mr. Majura, Advocate holding briefs of Mr. Kobas, Advocate for the Applicant.
2. Respondent: Absent (They are aware of the ruling date today).

[68] ILO convention on Freedom of Association and Protection of the right to organize convention 87 of 1948 see also Prof. Basson et al note 62 at p. 27 "Freedom of Association"

Court: Ruling is read over and explained to the party who is present as above shown.



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