IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DODOMA

MISCELLANEOUS LABOUR APPLICATION NO. 3 OF 2023

DEUS GRACEWELL SEIF.....1ST APPLICANT
ABUBAKAR SALUM ALLAWI.....2ND APPLICANT

VERSUS

CHAMA CHA WALIMU TANZANIA (CWT).....RESPONDENT

RULING

Last Order: 22/11/2023
Ruling: 19/12/2023

MASABO, J:

By a chamber summons filed in this court under, Rule 24(10)(b) 24(11),(b) of the Labour Court Rules, 2007, and section 95 of the Civil Procedure Code, Cap 33 RE 2019 (the CPC), the applicant has prayed that this court find one Maganga Moses Japhet in contempt of the order issued on 13th December 2022. The order was an injunctive it order with the effect of restraining the respondents, its employees, servants and other persons acting on the respondent's name from proposing and discussing any agenda involving the applicant's disciplinary measures at the respondent's National General Meeting scheduled for 15th to 16th December 2022, pending hearing and determination of Misc. Labour Application No. 17 of 2023. They have subsequently prayed that the said Maganga Moses Japhet be committed to prison for six months.

The application was contested by the respondent through a counter affidavit deponed by Maganga Moses Japhet who is identified as the principal officer of the respondent. Accompanying the counter affidavit is a notice of preliminary objection which is the subject of the present ruling. The notice has the following three limbs: **one**, the application is time barred; **two** the application is *sub judice* to Civil Application No. 49/03 of 2023 which is pending before the Court of Appeal and **three,** the application is bad in law for citing Maganga Moses Japhet who was not a party to the Miscellaneous Labour Application No. 17/2022 from which the present application emanates. At the hearing of the preliminary objection, a new limb was raised that, the application is bad in law as it has been overtaken by events. With the consent of the counsels for the applicants, leave was granted to the parties to argue the new limb hence making a total of four limbs.

The hearing of the preliminary objection proceeded orally. Both parties had representation. The applicants were represented by Messrs Jeremiah Mtobesya, Nesto Mkoba and Nashon Nkungu, all learned counsels whereas the respondent enjoyed the service of the legal minds of Messrs Gabriel Mnyele, Barnabas Nyalusi, Florence Burdaa and Leornard Haule, learned counsels.

Submitting on the first limb of the preliminary objection, Mr. Mnyele argued that much as the application has been made under Rule 24(10)(b) and 24(11)(b) of the Labour Court Rules, 2007 and section 95 of the Civil Procedure Code (CPC) Cap. 33, the prayers are under section 95 of the CPC

to which no time limitation is prescribed. Thus, the applicable limitation is 60 days as provided for under Item 21 Part III of the Schedule to the Law of Lamination Act, Cap 89 RE 2019, which carters for actions under the CPC for which no time limitation is provided. He proceeded that, the contempt complained was allegedly committed on 15th and 16th December 2022. The duration of 60 days counted from this date lapsed on 14/2/2023 whereas the present application was filed on 14/3/2023, hence time barred as it was late by 29 days. Relying on section 3(1) of the Law of Limitation Act, Mr. Mnyelle concluded and prayed that the present application be dismissed. In further fortification, he cited the case of **M/S Sopa Management vs TRA**, Civil Appeal No. 25 of 2010, CAT (unreported).

Mr. Nyalusi, submitted on the 2nd and 3rd limb of the preliminary objection. For the second limb he submitted that the order against which the prayer for contempt is sought was challenged through an application for revision which is now pending before the Court of Appeal. The application for revision was filed on 1/2/2023 and it was registered as Civil Application No. 3 of 2023. Therefore, there being a pending revision over the same order, this matter can not proceed as it is *res sub judice* to the revision application before the Court of Appeal and is barred by section 8 of the CPC. In support, he cited the decision of this Court in **Impala Terminals Tanzania Ltd. vs Elipidius Concordio Mkokerwa (Misc. Application 84 of 2023) [2023] TZHCLD 1237 TanzLII**; and in **National Insurance Cooperation vs Kweyamba Quaker** [1999] TLR 150 where it was held that in the absence of a

withdrawal of matter pending in the higher court, the lower court can not entertain the matter.

On the third limb, he argued that the application is incompetent for citing Maganga Moses Japhet who was not a party to the Misc. Labour Application No. 17/2022. He was not served with the order and he never made any decision amounting to contempt. Hence, he has been wrongly sued.

Lastly, on the fourth limb, he submitted that the present application emanated from Misc. Labour Application No. 17 of 2022 which is no longer pending as it was withdrawn on 24th July 2023. He proceeded that, the alleged contempt order was interlocutory to the application. Therefore, since the application from which it emanates was withdrawn it has lost the legs to stand on. Buttressing this point, he cited the case of **Felix Emannuel Mkongwa v Andrew Kimwaga**, Civil Application No. 249 of 2016 [2020] TZCA 333 TanzLII, CAT (unreported) and **African Trophy Hunting Ltd v The AG and 4 Others** [1999] TLR 408, where it was held that the withdrawal of the application terminates the order and all subsequent applications. Based on this, he prayed that the application be set aside.

In reply, Mr. Mtobesya submitted that the preliminary objection is misconceived because first, on 15th and 16th December 2022, the respondent defied the court order and since then she has been in continuous breach as provided for under section 7 of the Law of Limitation Act. He amplified that, under this law, it is provided that there are wrongs which unless they are

remedied, they shall continue to be in breach. Defying a court order is one of such wrongs. Therefore, since the respondent has not rectified what they breached they are still in contempt. Further, it was argued that the decision cited in support are distinguishable and should be disregarded.

On the second preliminary objection, it was submitted that it is not a pure point of law as the existence of the application before the Court of Appeal is a factual issue hence not within the scope of preliminary objection as it is not a pure point of law. As to the merit of this preliminary objection, Mr. Mtobesya submitted that the doctrine of *res sub judice* is inapplicable in this case because as held in **Exim Bank Limited vs Bethanya Garage Limited** and 4 others, Commercial Case no. 18 of 2015 [2015] TZHC ComD 2095 TanzLII, for a suit to be sub-judice, 4 ingredients must exist: **first**: there must be two pending suits one previously filed. **Two,** the parties must be the same or suing under the same title. **Three**, the matter must be directly and substantially the same in the two suits. And **last,** the two suits must be pending in competent courts. Contrary to the requirement that the fact in issue in both cases be identical, in the present case, the subject matter in the two applications is not identical. The application before the Court of Appeal concerns the legality of the order whereas the present case concerns contempt of the said order. Put otherwise in the application for revision the respondent is seeking nullification of the order whereas, in the present application, the respondents are praying that the respondent be found to have disobeyed the court order and in so doing, offended the trite rule that the court orders must be obeyed unless nullified by a superior court. Thus,

even if one is in disagreement with the order and he intends to challenge it, he must obey it unless and until it is reversed on appeal or revision by a superior court. Further, it was submitted that the principle of res *sub judice* applies horizontally and not vertically. That is, for the principle to apply the matter must not have been decided which is not the case in point. In the foregoing, he submitted that the objection be overruled for want of merit.

On the 3rd limb, he submitted that the point is a factual one hence not a preliminary objection. The fact that Maganga Moses Japhet did not anyhow conduct himself in contempt of the court or that he was not served with the injunctive order of this court are all factual and require evidence to establish. Hence, they do not qualify as a preliminary objection. In the alternative, he submitted that Maganga Moses Japhet is the one who deponed all the respondent's affidavits and he knew very well what was happening. Therefore, he cannot escape liability. Lastly, he submitted that the fact that Maganga Moses Japhet should not be cited for contempt as he was not a party to the application is also misconceived because much as he was not a party, he was the principal officer of the respondent and for that reason, bound by the restraint order as it was addressed to the respondent, its employees, servants and all persons acting for the respondent. Mr. Mtobesya added that the respondent being an artificial body could not have, on its own, acted in contempt of the order of the court. The contempt must have been done by its officials and Maganga Moses Japhet being the principal officer, was the one responsible.

I have carefully and dispassionately considered the submissions in support of the preliminary objection and the submissions in opposition. Since Mr. Mtobesya has questioned the competency of some of the limbs of the preliminary objection, I will start with the concept of preliminary objection as articulated in **Mukisa Biscuits Manufacturing Company LTD v West End Distributors LTD** (1969) EA 696. In that case, a trite principle was set that, a preliminary objection should be on a pure point of law that has been pleaded or which arises by clear implication out of the pleadings and may include such points as jurisdiction of the court or a plea of limitation. Cementing this rule in **Karata Ernest & Others v AG**, Civil Revision No. 10 of 2010, [2010] TZCA 30 TanzLII, the Court of Appeal stated thus, a preliminary objection:

> "…..consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings..."
> ....., where a point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. ..."

And, in **Soitsambu Village Council v Tanzania Breweries Limited and Tanzania Conservation Limited,** Civil Appeal No. 105 of 2011, CAT (at Arusha (unreported), it stated that:

> "a preliminary objection should be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate facts, such an issue cannot be raised as a preliminary objection on a point of law."

Guided by this principle I have asked myself whether the four limbs of the preliminary objection are within the scope of preliminary objection. Having examined all these limbs, I have observed that whereas the first two limbs and the added limb are predicated on pure points of law hence, pass the test above, the third limb does not. From the submissions advanced by Mr. Nyalusi in support of this point, it is crystal clear that, although the fact that Maganga Moses Japhet was not a party to the proceedings from which the present application emanates is undisputed, the fact whether he was served with the order and whether he did any contemptuous act against it, are both purely factual and require evidence to ascertain. As there cannot be a preliminary objection where there are factual issues requiring the ascertainment from evidence, I am constrained to hold, as I do, that the third limb of the preliminary objection does not qualify as a preliminary objection and it is accordingly overruled.

Having resolved this, I will now address the remaining three limbs starting with the second limb of the preliminary objection as regards the principle of res subjudice. I need not be detained by this point as the law is straight and very well settled. Section 8 of the Civil Procedure Code, Cap 33 from which this principle emanates, operates as a bar for the multiplicity of suits and it is subject to certain conditions. As correctly submitted by Mr. Mtobesya, it is invoked only when there are two pending suits, the parties in both suits are the same or are suing under the same title, the fact at issue in both suits is directly and substantially the same and the two suits are pending in competent courts. Dealing with this provision in **Wengert Windrose**

Safaris (Tanzania) Limited vs Minister for Natural Resources and Tourism & Another (Misc. Commercial Cause 89 of 2016) [2016] TZHCComD 41 TanzLII, this court held that, for the principle of *sub judice* to be invoked, the following four essential conditions must be established. That is:

> 1.The matter in issue in the second suit is also directly or substantially in issue in the first suit;
> 2.The parties in the second suit are the same or parties under whom they or any of them claim litigation under the same title;
> 3.The court in which the first suit is instituted is competent to grant the remedy claimed in the second suit; and
> 4.The previously instituted case is pending.

When the submission made by Mr. Nyalusi in support of the third limb of the preliminary objection is weighted against these requirements, it becomes very obvious that it has been lucidly misconceived as it lacks some of the essential ingredients for subjudice. As correctly argued by Mr. Mtobesya, the first requirement above is missing as the facts in issue in these two applications are directly and substantially dissimilar. The application before the Court of Appeal seeks to challenge the legality of the injunctive order whereas the present application deals exclusively with the disobedience or contempt of the injunctive order before it was reversed or overruled by a superior court. In the circumstances, I am of the considered and settled view that this limb of the preliminary objection was hopelessly misconceived and it is without merit. Hence, overruled.

The second limb to which I now turn is on time limitation. For the respondent, it has been argued and submitted that the application has been filed out of time as it was filed after the expiry of sixty (60) days which are prescribed under item 21 Part III of the Schedule to the Law of Limitation Act as the time limitation for civil applications made under the CPC or any other law to which no time limitation is provided. The applicant on the other hand has relied on section 7 of the Law of Limitation Act in convincing this court that the application was filed within time as it involves a continuous breach. Section 7 of the Law of Limitation Act on which Mr. Mtobesya has sought refuge, provides that;

> "Where there is a continuing breach of contract or a continuing wrong independent of contract a fresh period of limitation shall begin to run at every moment of the time during which the breach or the wrong, as the case may be, continues." [emphasis added].

Luckily, this provision has been previously litigated in this court hence not alien. The relevant cases include **Brookside Diary Tanzania Ltd vs Liberty International Ltd and another (Commercial Case 42 of 2020) [2021] TZHCComD 2053**, TanzLII, **TABECO International Ltd v Attorney General and 3 others,** (Civil Case No. 139 of 2019) [2020] TZHC 3561, **Lindi Express Ltd vs Infinite Estate Limited** (Commercial Case 17 of 2021) [2021] TZHCComD 3313 TanzLII and **Tibe Keneth Rwakatare (Suing as an administrator of the estates of the deceased Getrude Rwakatare) vs. The Board of Trustees of Dodoma and Two Others** (Civil Case No. 03 of 2022) [2023] TZHC 22935, TanzLII. In all these cases this court has consistently held that the principle of

continuous breach is applied where there is a breach of contract of a continued nature as opposed to a one-off sale transaction. As held in the Indian case of **Bhojraj v. Gulshan Ali**, (1882) ILR 4 All 493 cited in **TABECO International Ltd v Attorney General and 3 others** (supra), the principle of continuous breach is applicable where;

> "the obligation created by the contract is ex necessitate of a continuing nature, and the right of action therefore naturally arises every moment of the time during which the breach continues"

And, as held in another Indian case of **The Rehabilitation Plantations Ltd vs. P.S. Ansary** as cited with approval in **Brookside Dairy Tanzania Ltd vs. Liberty International Ltd and Other** (supra);

> Cases involving "continuing" or "successive breaches" include those cases in which there is a promise to pay periodically, as for instance, payment of rent, annuities, interest, maintenance etc. In the case of a continuing tort, for instance, a fresh period, of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues.

From these authorities, the incompatibility between the principle of continuous breach and the submission made by Mr. Mtobesya is not hard to locate as it is utterly obvious. It would appear that the learned counsel materially misconceived the law as the present application emanates from a contempt of a court order which is not a contract, let alone a contract of a continuous nature that could have activated the principle of continued breach. Accordingly, I outrightly reject the argument.

I now turn to Mr. Mnyelle's submission that the application was filed after the lapse of 60 days hence offensive of Item 21 of Part III of the Law of Limitation Act. This court entirely agrees with the learned counsel that when the applicant filed the present application such duration had already lapsed. In fact and as he has argued, the contempt was allegedly committed between 15th to 16th December 2022 during the respondent's National General Meeting. The duration of 60 days counted from this date lapsed on or by 14/2/2023. The present application was filed 29 days later on 14/3/2023. While contemplating Mr. Mnyelle's enthusiastic argument. I have asked myself whether contempt proceedings fall within the blanket provisions of Item 21. As I was still contemplating, I was taken aback by the concept of 'contempt of court' and its rationale, which I shall briefly recite. Conceptually, contempt of court is defined by Black's Law Dictionary, 8th Edition, page 336 to mean;

> ".....a disregard of, or disobedience to, the rules or orders of the legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body"

Contempt of court may be civil or criminal. In our jurisdiction, contempt is covered under sections 114 and 124 of the Penal Code, Cap 16 RE 2022. They provide thus;

> 114 Any person who-
> 114 (a) willfully obstructs or knowingly prevents or in any way interferes with or resists the service upon himself or any other person of any summons, notice, order, of warrant or other

process issued by a court for service on himself or such other person, as the case may be;
(b) willfully obstructs or knowingly prevents or in any way interferes with or resists the execution of any summons, notice, order, warrant or other process issued by a court, or any person lawfully charged with its execution; or
(c) n/a
is guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding one year.

124. A person who disobeys any order, warrant or command duly made, issued or given by a court, an officer or person acting in any public capacity and duly authorized in that behalf, is guilty of an offence and is liable, unless any other penalty or mode or proceeding is expressly prescribed in respect of that disobedience, to imprisonment for two years.

What is decipherable from these provisions and the consensus view from literature is that, whatever its form, contempt of court is a serious wrong and attracts penal sanctions. Second, the courts have an inherent jurisdiction to punish the contemner irrespective of whether the contempt was committed in its presence or not as the disobedience, is considered as a serious threat to the dignity of the court and the rule of law. As stated by this court in the case of **Tanzania Bundu Safaris Ltd vs. Director of Wildlife & Another** [1996] TLR 246 HC (Mapigano, J as he then was);

"Disregard of orders of the court is certainly a matter of gravity, whatever the order and irrespective of whether it has been irregularly or erroneously made.

> The punitive jurisdiction of the court to punish for breach is based upon the fundamental principle that it is for the good of the public and the parties that such orders should not be despised or slighted.....
> The prime object of contempt proceedings is to vindicate the rule of law, rather than to punish an individual." [the emphasis is mine].

The Court of Appeal of Tanzania was of a similar view in the case of **Yusuph Shaban Luhumba vs Hapyness John & Others** (Civil Application 304 of 2022) [2022] TZCA 396 TanzLII, where it instructively stated that:

> "We subscribe to the trial judge that; Courts of law have inherent powers to enforce the obedience of their lawful orders. In the exercise of such powers, therefore, Courts of law are mandated, where necessary, to impose penal sanctions to compel obedience of its orders. The rationale behind the law is not only to protect the orderly administration of justice from being abused but to maintain public trust of the supremacy of the rule of law." [the emphasis is mine].

From these authorities and many similar authorities not cited here, it is crystal clear that a civil action on contempt of court, such as the present one, is a special proceeding as it transcends far beyond the rights and interests of the parties. It is an anchor for orderly administration of justice, maintenance of public trust in the judicially and a vindication of rule or law as opposed to the rule of power and tyranny. Unlike ordinary civil proceedings, it is substantially ingrained with criminal elements. Thus, it should not be taken lightly as that would perpetuate impunity against court,

disrupt court's dignity and cultivate a fertile ground for disobedience of court orders.

It can also be fairly inferred, I think, that contempt proceedings are akin to execution proceedings. Also, much as in civil contempt such as the present one the applicant is the aggrieved party and he wishes, and may as well decide to waive his right to sue the contemner. As held in the Indian case of K. **B. Rajendran vs. The Registrar-General and 3 others.** Cent. P. SR. No. 18117 of 2017 cited by this court in **Nkumbi Malashi Holela vs Musa Christopher Ginawele @ Musa Balali & 6 Others** (Misc. Land Application No. 7 of 2023) [2023], the applicant in such application is tantamount to a whistle-blower. In my view he has three main roles. The first role is to alert the court that its lawful orders have been disobeyed and the second is to assist the court in establishing that the disobedience was willful and malicious. The beneficiary of these two is not the applicant but the court itself and the society at large. His third role is to vindicate the damages he has suffered because of the disobedience. As stated in a highly persuasive authority of the High Court of Uganda in **Florence Dawaru vs. Angumale Albino & Anor** HC MA No. 0096 of 2016 as cited with approval by the Supreme Court of Uganda in **Betty Kizito v Dickson Nsubuga and 6 Others** (Civil Application No 25 of 2021) 2022 UGSC 19 (6 June 2022):

> "However, for contempt that is not committed in the face of court, this kind of contempt is sui generis. It is usually initiated by a litigant who by motion brings to the attention of court conduct believed to be in contempt of court. <u>All contempt proceedings are matters between the court and the alleged contemnor. Any, person who moves the machinery of the court</u>

for contempt only brings to the notice of the court certain facts constituting contempt of court. [emphasis is added]

For the foregoing view to which I fully subscribe, it would be utterly absurd for any court to turn away the whistleblower simply because he was late for just 29 days as in doing so, the court will be digging a pit for the burial of its dignity and the rule of law.

I have also observed while composing this ruling that, some jurisdictions such as Kenya and India have adopted specific legislations to carter for the peculiarities of contempt proceedings. Among other things, such enactments prescribe a time limitation for actions based on contempt of court. For instance, in Kenya, the Contempt of Court Act, No. 46 of 2016 provides a time limitation of six (6) years for actions on civil contempt of court (see section 34), and in India, section 20 of the Contempt of Courts Act, No. 70 of 1971 sets a time limit of one (1) year from the date on which the contempt is alleged to have been committed. It is not my intention to dwell on these limitations as that would entail stretching too much. For purposes of this application, it suffices, I think, to just comment that they provide a reasonable time for the court to vindicate the rule of law and to guard its dignity by ensuring that, its orders are not ridiculed or disobeyed with impunity.

For the foregoing reason and after thoroughly reading of the law, I am firmly convinced that, much as the Civil Procedure Code or the Law of Limitation does expressly set a time limit for applications arising from contempt of

court, such applications do not fall in the blanket provision of Item 21. My strong conviction is that they fall under Item 20 of Part III to the Schedule to the Law of Limitations Act which sets a time limitation of 12 years for enforcement of judgment, decree, or order of court for which no period of limitation is provided. As I have already stated, contempt proceedings deal with enforcement of court orders. Hence it will be materially wrong to put it under item 21. That said and done, I decline the respondent's invitation and hold the application to be very well within time.

The additional limb of the preliminary objection is that the application is incompetent for being overtaken by events. I will not allow myself to be detained by this limb because, although as the application from which the alleged contempted order emanated was indeed withdrawn on 24th July 2023, the withdrawal of the application was preceded by the alleged contempt. In fact, and to be more specific, the withdrawal happened seven (7) months after the alleged contempt. Further, and since both parties are of a common understanding on this fact and they are all in agreement that the order had not been overruled or reversed by the superior court when the respondent allegedly committed contempt on 15th and 16th December 2022, I do not see how the withdrawal order could have possibly rendered the contempt proceedings incompetent as at the time of disobedience the order was still a lawful order of the court irrespective of whether it had irregularities and the respondents were discontented by it.

As stated while dealing with the first and second limbs of the preliminary objection, the present application deals with disobedience of a court order, hence a *sui generis* and distinguishable from the authorities cited by the respondent's counsel in support of this point. The submission by the respondent counsels would have been tenable had the contempt complained of been committed after the withdrawal of the application. For the foregoing reasons, this limb of the preliminary objection also fails and it is overruled.

That said and done the preliminary objection fails in its entirety and it is overruled for want of merit. As the application has its genesis in a labour matter, there will be no costs.

DATED at **DODOMA** this 19th day of December 2023.

J. L. MASABO

JUDGE